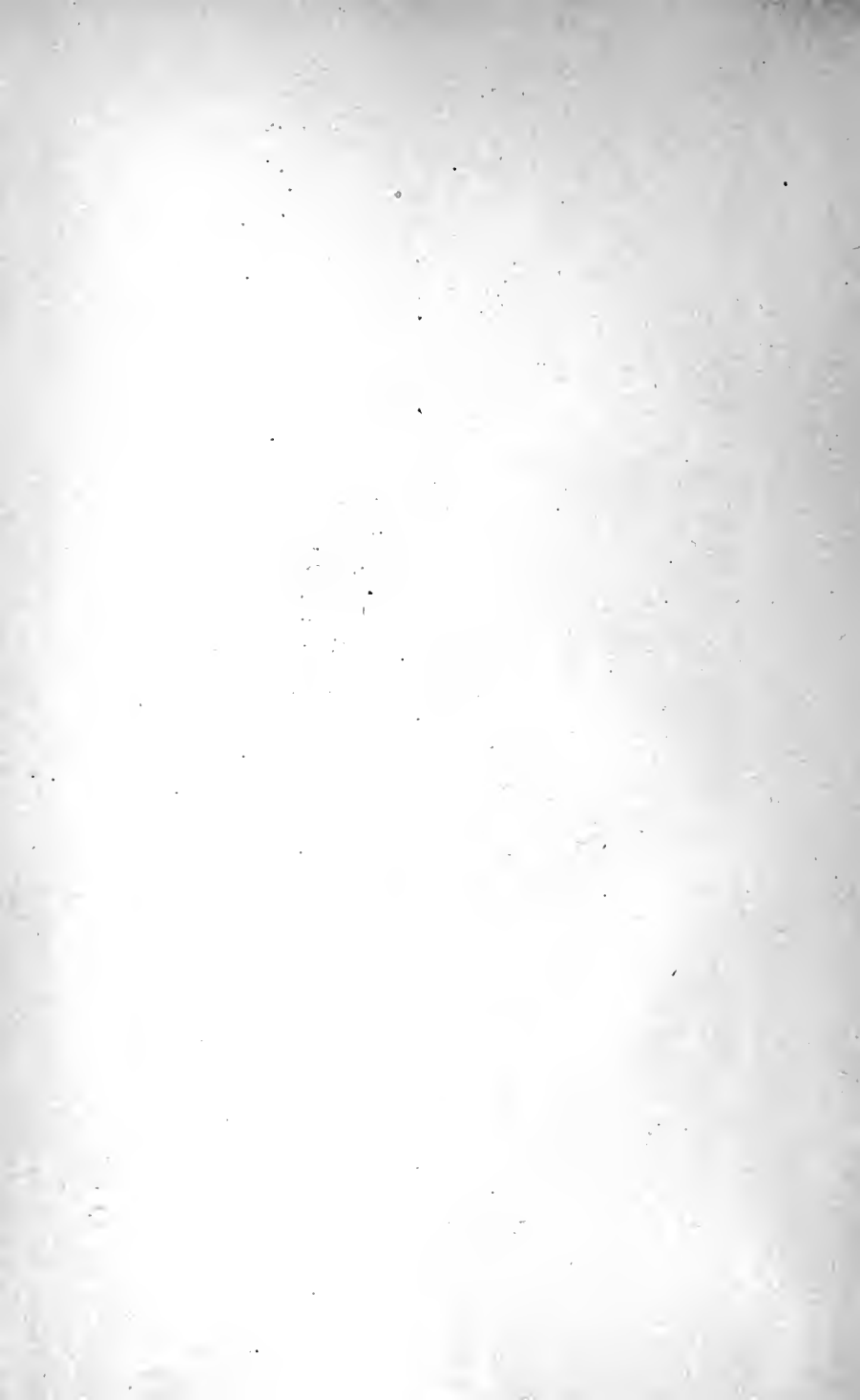
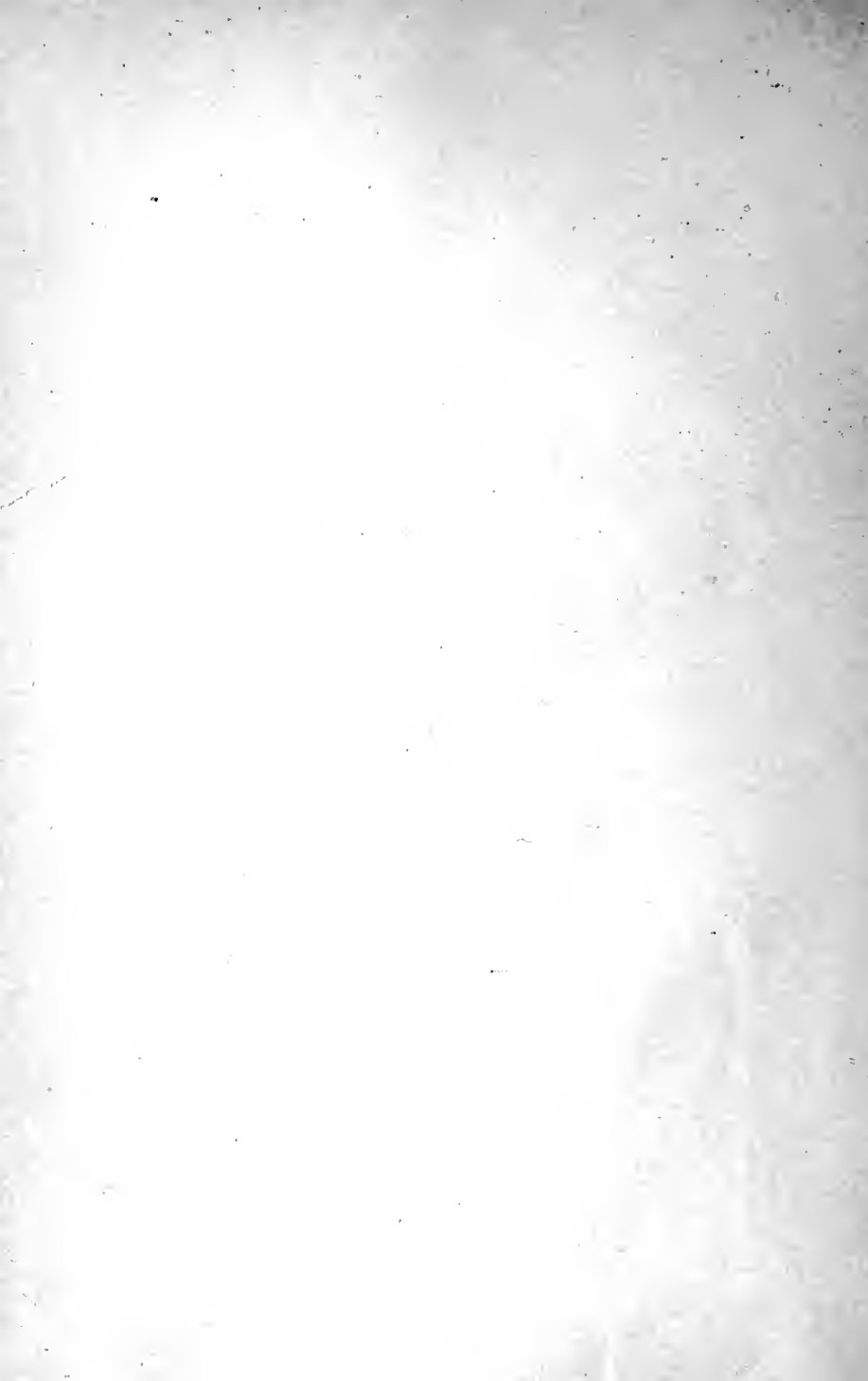
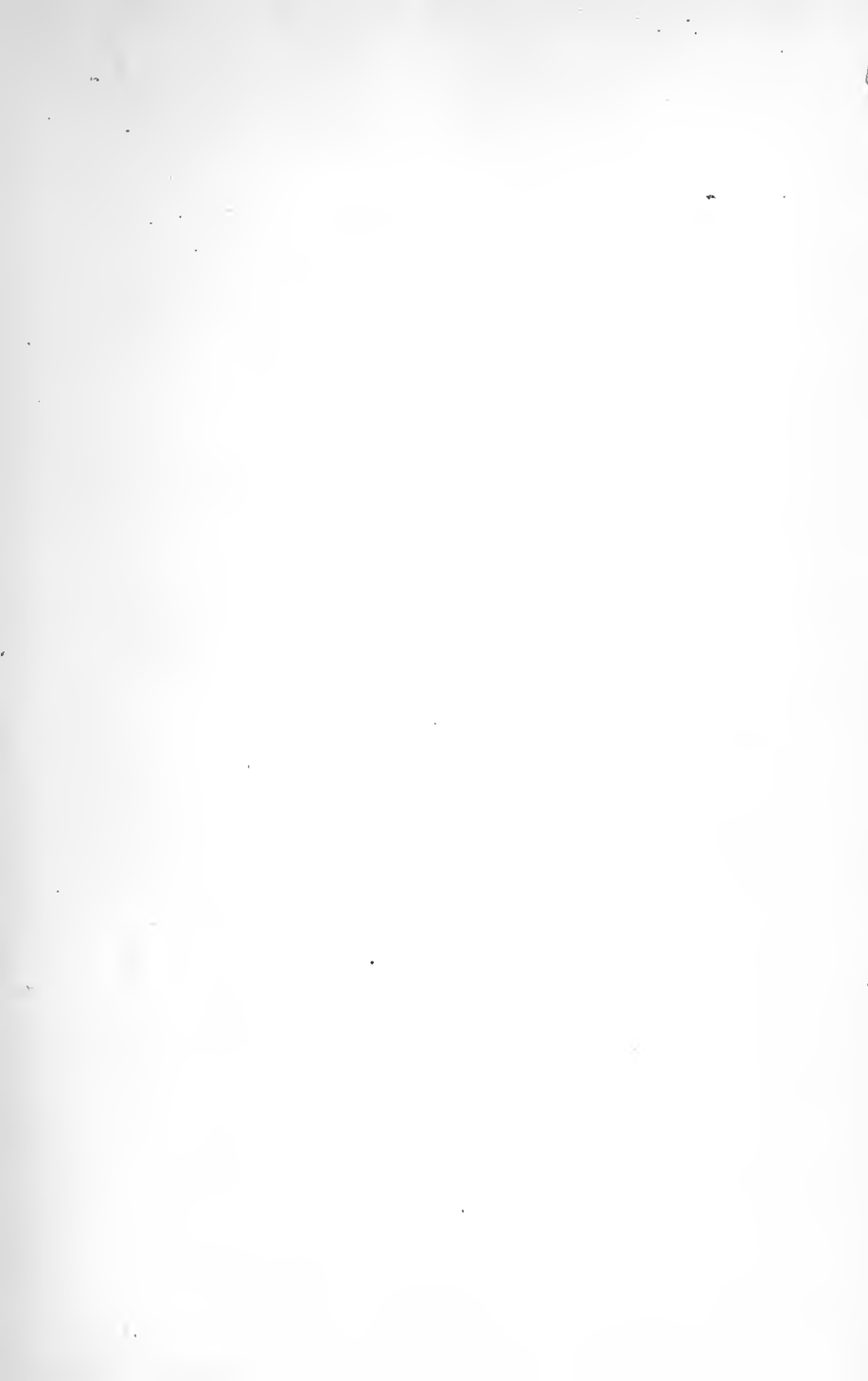


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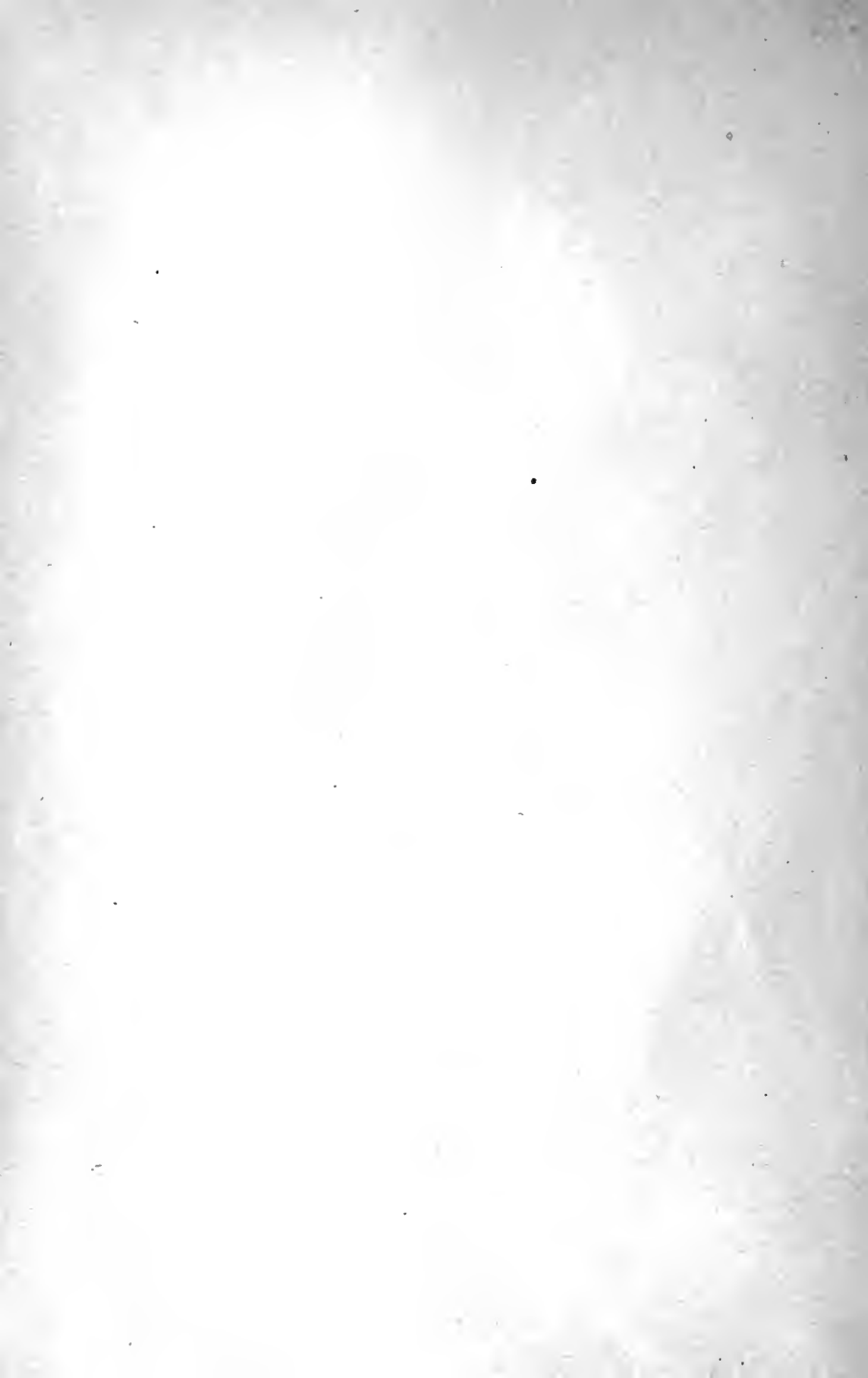
HENRY LAUREN CLINTON

P R E F A C E

My work entitled "Extraordinary Cases" having been received with generous favor by the profession, the public, and the press, I am encouraged to send forth another volume, containing sketches of other celebrated trials with which I was professionally connected during my forty years' active practice of law in the city of New York. For the last hundred years there have been no trials in this country of more intense and thrilling interest than some of those recorded in this volume, especially the trial of Mrs. Cunningham for the murder of Dr. Burdell, in 1857; the trial of William M. Tweed, in 1873, for official misconduct (which resulted in his conviction and imprisonment); the case of John Kelly, the distinguished leader of Tammany Hall, against Mayor Havemeyer, for libel; and the trial of Richard Croker, the noted politician, for the murder of John McKenna, in 1874. In the language of the Preface to my former work, which is equally applicable to the present one, "There are a few cases of peculiar and extraordinary character which, if published, never lose their interest. I have endeavored to embrace such, and only such, in this volume."

H. L. CLINTON.

NEW YORK, *September*, 1897.



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CELEBRATED TRIALS

CHAPTER I

CUNNINGHAM-BURDELL MURDER CASE

Discovery, January 31, 1857, of the Murder of Dr. Harvey Burdell, at 31 Bond Street, New York City.—Proceedings at the Coroner's Inquest.

DR. HARVEY BURDELL, a regularly educated physician, forty-six years of age, who since he graduated had devoted most of his life to dentistry, and had attained great eminence as a dentist—a man of intelligence and culture—was, on the night of the 30th of January, 1857, foully murdered in his office, in a house owned by him and in which he resided, known as 31 Bond Street, in the City of New York. His office-boy, when he arrived at about half-past eight o'clock the next morning, upon entering the doctor's office, found him, surrounded with blood, lying on his face close to the door. Greatly frightened, he informed the inmates of the house, and Dr. Francis, Dr. Main, and Dr. Roberts were sent for. Coroner Edward Downes Connery was at once notified, so that he could hold an inquest. At first it was thought that Dr. Burdell had committed suicide, but it was soon ascertained that he had been assassinated. There had

been inflicted upon him, by a dirk or sharp instrument, fifteen or more wounds, almost any one of which would have been fatal. He was stabbed through the heart, and the carotid artery was severed. The inmates of the house were: Mrs. Emma Augusta Cunningham, supposed to be a widow; her daughters Augusta and Helen, about eighteen and sixteen years of age respectively, and her two sons, ten and nine years old; George V. Snodgrass, a young man of about twenty years, a son of the Rev. Dr. Snodgrass, a Presbyterian clergyman of note; Hon. Daniel Ullmann, a lawyer, who had recently been a candidate for Governor of the State of New York, and came very near being elected; John J. Eckel, a lodger in the house, who was in the employ of Smith Ely, Jr., afterwards State Senator, member of Congress, and Mayor of the City of New York; and two servant-girls.

Although the murder must have occurred after the inmates of the house retired for the night, they knew nothing of it until it was discovered by the office-boy next morning. That the probably fierce contest of the assassin and his victim, and the shrieks of the latter, should not have been heard by any one in that house seemed almost incredible. The Coroner, on the same day the murder was discovered, commenced his inquest, and examined John J. Burchell, the office-boy; Allen T. Smith, Dr. W. B. Roberts, John J. Eckel, Hannah Conlan, the cook; Dr. J. W. Francis, and Mrs. Cunningham. The witness Smith, who had business relations with the deceased, and Hannah, the cook, testified that they had heard angry words between Dr. Burdell and Mrs. Cunningham in relation to some papers, including promissory notes of considerable amount. Dr. Burdell charged her with having stolen them, which she denied. In her testimony before the Coroner, Mrs. Cunningham gave the following account of the quarrel:

"Dr. Burdell had a judgment against his brother, William Burdell; that judgment he took from a Mr. Pierrepont, in Wall Street. Dr. Burdell assigned the judgment to me, and I held it. A short time after that he told me that he wished me to give him a note for the amount of the judgment at twelve months after date. I gave him the note and held the judgment. * * * Last September, Dr. Burdell accused me of stealing the note I gave him. I told him I knew nothing about it."

Mrs. Cunningham testified that at the time of the quarrel in September about the note she accused Dr. Burdell of not fulfilling his promise to marry her, and she also charged him with having brought females into the house for improper purposes. She admitted that she was jealous of him. She testified that she was married to him by a clergyman at the residence of the latter; and she produced a marriage certificate stating that she was married to the deceased on the 28th day of October, 1856, by the Rev. Uriah Marvine, of the Dutch Reformed Church in Bleecker Street, New York City.

Early the day after the discovery of the murder Mrs. Cunningham retained Mr. Clinton as her leading and principal Counsel. He at once went to 31 Bond Street, and had a brief interview with her. Afterwards he attended the proceedings before the Coroner. The next day the Rev. Mr. Marvine was examined, and testified that he performed the marriage ceremony between a man who called himself Harvey Burdell and a woman, who brought with her a witness who she said was her daughter. After viewing the corpse he gave no opinion in his evidence as to whether it was that of the man whom he had married. Upon being shown Mrs. Cunningham he said he could not recognize her as the woman he married to the man calling himself Burdell. He also testified that he did not believe, if he should see her, that he could identify the witness whom the

woman brought with her ; but upon being taken into the room where the daughter (Augusta) was, he did recognize her as the one who had witnessed the marriage ceremony.

By this time public interest in the case was intense. The quarrels between the deceased and Mrs. Cunningham; the alleged secret marriage; the fact that the officiating clergyman did not identify either of the parties to the marriage, but recognized only the daughter, inflamed the public mind to the highest pitch against Mrs. Cunningham. It was assumed that she procured some one to simulate Dr. Burdell at the marriage ceremony; that she was guilty of the murder, which she had been months in planning; and that her motive was, upon his death, as widow, to obtain his property, which was thought to be large. In other words, the public jumped to the conclusion that Mrs. Cunningham was guilty of a cold-blooded, deliberate, long-premeditated, fiendish murder, in order to gratify an insatiate greed for money. The Coroner appeared to imbibe the same belief, and from the beginning to the end of the inquest the object of all his proceedings seemed to be to prove Mrs. Cunningham and one or more of the inmates of the house guilty of murder. The Coroner's inquest proceeded from day to day for about two weeks, and over a hundred witnesses were examined. The testimony took a wide range, and but very little of it was at all relevant or tended in any way to show who committed the murder. In no instance, in this country or elsewhere, has any other inquest been conducted as was this. One or two instances will illustrate the mode of the Coroner in examining witnesses. While the Rev. Mr. Marvine was testifying in respect to the marriage, the Coroner, in alluding to Mrs. Cunningham's appearance at the time of the ceremony, said :

Question. "Did she have any virgin, angel blushes? Was she like a virtuous woman, or a woman of easy virtue?"

Answer. "You must remember that she described herself as a widow."

The following is an extract from the testimony of Mary Donohue, the servant-girl:

Question (by the Coroner). "Did you ever hear any threat yourself? Or were you ever told of any by any of the domestics in the house, as having been used by Mrs. Cunningham towards Dr. Burdell?"

Answer. "I never heard any directly say so; but she said it was time that he was out of the world, for he was not fit to live in it, or something like that. Her eldest daughter, Augusta, said the same; she said he was a bad man."

Coroner. "I knew, Mary—I knew that you carried your tail behind you, by gracious!"

Dr. Burdell, for some months before his death, took his meals at the Metropolitan Hotel. During Friday, the last day of his life, he attended to his dentistry business as usual at his house, 31 Bond Street. The Rev. Dr. Cox, Dimis Hubbard, a cousin of Dr. Burdell, Mrs. Stansbury, who was to take the house 31 Bond Street on the first of the ensuing May, Mr. Blaisdell, and Mrs. Mary Jane Miller testified to having seen Dr. Burdell during the day at his house. Some of them saw him upon dentistry business, and some upon other matters. The last seen of the deceased at his house was about the time he left for dinner at the Metropolitan Hotel, near five o'clock that afternoon. Dr. Cox called on Dr. Burdell about one o'clock on Friday. He returned at five o'clock that afternoon, and was told by Mrs. Cunningham that Dr. Burdell had gone to dinner. Mrs.

Miller testified that she saw him that afternoon, between four and half-past four o'clock; that he told her that after dining he should go to Brooklyn, and would not be back to his house before going there, and that it would be late before he returned. And yet Mr. Blaisdell, who had been for three years in partial partnership with him in business, on the corner of Broadway and Franklin Street, and who had been on intimate and confidential terms with him ever since, testified that he and Dr. Burdell, on that Friday, agreed to meet that evening at 31 Bond Street at seven o'clock, Dr. Burdell stating that he desired Mr. Blaisdell to spend the evening with him, and stay all night if possible, the latter, although promising to be there at seven o'clock, stating that he could not spend the night there. Robert A. Tobey testified that on Friday night, the night of the murder, between nine and half-past nine o'clock, he saw Dr. Burdell (whom he knew) on the northeast corner of Bond Street and the Bowery, apparently waiting for some one. Between this time and when he left the house for dinner, near five o'clock, no witness spoke of having seen him. Nothing appeared in the evidence as to his whereabouts after this time until the discovery of the murder next morning.

Considerable evidence was given in respect to the relations existing between Dr. Burdell and Mrs. Cunningham. That they had serious differences in September, 1856, was an undisputed fact. With regard to the charge he made against her of stealing a promissory note, the version she gave of it in her evidence was unquestionably correct. Nothing appeared throughout the entire testimony to shake her statement. Three police officers, John Little, Hector Moore, and Edgar Davis, testified to the circumstances of the charge of theft of the note, all of whom were at the house, 31 Bond Street, at the time. Officer Little said that

when Burdell charged her with stealing the note, she stated in his presence and hearing that "she was his wife by every tie that could be." To this Dr. Burdell made no answer. In her excitement she raised her hand and struck him, at the same time stating that he had deeply wronged her. Officer Moore's evidence was to the same effect. Officer Davis testified that Dr. Burdell told him that while he was asleep Mrs. Cunningham took the key of his safe from his trousers pocket, and then stole the note; that while the doctor was stating these things Mrs. Cunningham, in a tremendous rage, rushed in upon them, and told him not to believe a word the doctor had said—that he had ruined her and her family. He testified that Mrs. Cunningham said "she would have satisfaction—that she would have his heart's blood, or something to that effect." The police officers told Dr. Burdell they could do nothing in the matter, and that he and Mrs. Cunningham had better adjust their difficulties themselves. If not, the doctor could apply to a police magistrate for a warrant. Mrs. Cunningham, enraged and indignant at the insults and ignominy thus heaped upon her, commenced two suits in the New York Superior Court against Dr. Burdell—one for breach of promise of marriage, and the other for slander in charging her with the theft of the note. In each of these suits Dr. Burdell was arrested, and held to bail in the sum of six thousand dollars.

Dr. W. B. Roberts testified that after these suits were settled Dr. Burdell called at the office of the witness, and brought the bond he had given on his arrest. This bond was dated the 14th of October, showing that he had been arrested as early as that date. It was taken up on the 22d of October. Dr. Roberts testified as follows in respect to the interview with Dr. Burdell:

"After he [Dr. Burdell] had settled the affair, he brought

the bond up to my office, and said the thing was all settled; that he had no doubt *he* had done wrong, and she had too; he said she ought not to have brought this suit, and that she would not have done it if he had not accused her of stealing the note."

* * * * *

" 'It is all settled now,' said he, 'and I am going to be her friend and that of her family, and she is going to give me a paper releasing me.' "

Among Dr. Burdell's papers found by the Coroner was the following, in Dr. Burdell's handwriting:

"In consequence of the settling of the two suits now pending between Emma August Cunningham and myself I agree as follows:

"1. I extend to herself and family my friendship through life.

"2. I agree never to do or act in any manner to the disadvantage of Mrs. Emma A. Cunningham.

* * * * *

"HARVEY BURDELL."

On the 28th day of October, six days after he was discharged from arrest in the suits brought against him by Mrs. Cunningham, he was married to her, if her testimony and that of her daughter were true, and the marriage certificate of Rev. Mr. Marvine was correct. Considerable evidence was given with a view to show that Dr. Burdell was not married to Mrs. Cunningham, but that some one personated him in the performance of the marriage ceremony. Mr. Blaisdell testified that on Friday, the last day of Dr. Burdell's life, he said he was not married, and that he *would not marry the best woman living*. He testified that Dr. Burdell had a great deal of conversation with him, and it turned, as it almost always did, "about people who were getting married and *married life—what a curse it was*." Rev. Dr. Cox testified

that on the same day Dr. Burdell told him that he had never been married, and that he never intended to marry, stating that "women are so artful." Dr. Burdell said "that was the reason he had no confidence in the sex." He said "he had known so much of the sex; that *a woman when artful could circumvent a man when she pleased to set about it.*" Mrs. Stansbury testified that in her interview with Dr. Burdell, on that Friday, he told her that Mrs. Cunningham "thought he was an old bachelor worth about one hundred thousand dollars, and that he did not know what he could do with it himself, and that she was determined she would marry him, and he was determined he would not marry her." Cyrenious Stephens, who had known Dr. Burdell eight years, and who had been his patient, testified that in January, 1857, shortly before the murder, Dr. Burdell, in speaking to him about Mrs. Cunningham, said: "That woman has wanted me to marry her. *I would not have her to save all my money and my life.*"

An attempt was made to show that Dr. Burdell was not in New York City on the 28th of October, the day of the marriage, but was in Saratoga. Allen T. Smith testified that he believed Dr. Burdell was in Saratoga at that time.

From this evidence the public jumped to the conclusion that the marriage of Mrs. Cunningham was a fraud, and that she had procured some one to personate Dr. Burdell. Among the head-lines to the reports in the newspapers next day, of the proceedings before the Coroner, were the following:

"DARKER FOR THE SUSPECTED PARTIES

"Dr. Burdell was Probably at Saratoga on the Day of the Alleged Marriage."

This, with the other testimony, confirmed the belief, which was from the start impressed upon the public

mind, that the marriage was fraudulent. But worse testimony, in public estimation, followed. Some days afterwards Levi S. Chatfield and B. C. Thayer, who, in the suits of Mrs. Cunningham against Dr. Burdell for breach of promise of marriage and slander, had acted in their professional capacity as her lawyers, testified before the Coroner and his jury. Mr. Chatfield, after stating about the commencement and discontinuance of these suits, testified in respect to the breach-of-promise case as follows:

Judge Capron. "Now we want to get at the fact whether there was a subsequent disposition on her (Mrs. Cunningham's) part to revive that."

Mr. Chatfield. "Mr. Thayer could tell you much better than I can about that. I know this, that in the neighborhood of a month after the discontinuance—that is, after the 22d of October—I had a conversation with Mr. Thayer in my office in which this matter was spoken of. Of course I felt some little interest in the case, although I never saw the parties, and I understood from him, *if it is competent to say what he said*, that the lady had been to his office the day before to renew the suits—to commence the suits over again—because the doctor had refused to perform his promise."

This testimony of Mr. Chatfield was amazing. If he understood correctly (which, probably, he did not) what Mr. Thayer said, he had no legal nor moral right to disclose one word of it, even in private conversation, much less in public, where it was sure to be caught up by the newspapers and published throughout the civilized world. The conversation with Mr. Thayer was privileged. If Mrs. Cunningham consulted her Counsel (Mr. Thayer) in relation to reviving the breach-of-promise case, it was *her* right that such consultation should forever remain a secret, unless she consented to its disclosure. It was right that Mr. Thayer should consult

with Mr. Chatfield ; he was associate Counsel with him in the matter. If clients believed that their secrets upon consultation with lawyers would be disclosed by them in private or public, they would shun such lawyers as they would a pestilence. Mr. Chatfield having been Counsel for Mrs. Cunningham in the original suits, if they were to be revived, or new suits commenced, still occupied the relation of Counsel to her in respect to the subject-matter of those suits, and that relation would continue until she notified him of her wish to terminate it. If neither Mr. Chatfield nor Mr. Thayer had been Counsel for Mrs. Cunningham at this time, the statement of Mr. Thayer would have been merely hearsay and inadmissible as evidence. Mr. Chatfield was an able lawyer. He had been Attorney-General of the State of New York, and had figured conspicuously and largely in the public and political affairs of the State. It cannot be assumed that he had such a slender knowledge of law as not to know that his testimony above cited was inadmissible, illegal, and outrageous. In prefacing his statement of the conversation with Mr. Thayer, he said, "I understood from him, *if it is competent to say what he said.*" He did not wait to have it decided by the Coroner whether it was competent to disclose professional conversation with his associate Counsel. He should have taken and firmly stood upon the ground that the conversation was privileged, and refused to disclose it even if the Coroner held it to be competent.

After the close of Mr. Chatfield's evidence, Mr. Thayer, who, with Mr. Clinton, was present as Counsel for Mrs. Cunningham, was called as a witness and sworn. Mr. Thayer was taken by surprise, and for the time seemed to have parted company with the coolness and self-possession which a lawyer ought ever to maintain. Mr. Chatfield—in years and experience at the Bar by far his senior, whom he looked up to with respect and

reverence, upon whom in important litigation he had relied as his leader—had given extraordinary testimony violating the sacredness of professional consultations. Mr. Clinton would have advised Mr. Thayer under no circumstances to testify to a word of professional consultation he ever had with his client, Mrs. Cunningham, but was prevented doing so, as will be seen by the following extract from the proceedings, as reported in the New York *Daily Times* of February 9, 1857:

“EVIDENCE OF B. C. THAYER

“The Coroner asked if Mr. Thayer was in the room. It was answered that he had been in the room a few minutes before, and it was supposed he was then up-stairs. He was sent for and brought down. A hurried conversation was carried on for a few seconds between him and Mr. Clinton; he was then sworn by the Recorder. In taking the witness seat he made an effort to speak with Mr. Clinton, who was standing by his side. He was frustrated, however, by the Recorder, who very promptly interposed and said: ‘I object to any conversation with Counsel after the witness is sworn.’

“Judge Capron informed the witness that he was about to be questioned as to certain facts relating to Mrs. Cunningham’s suits against Dr. Burdell. The questions would refer mainly to a point of time.

“The Recorder said it was a settled rule that upon a merely collateral matter the witness could not refuse to answer.

“*Mr. Thayer.* ‘Gentlemen, I am perfectly willing to tell everything that I can consistently with my situation.’

“*Coroner.* ‘Gentlemen, I decidedly must stand up here and say that any man who refuses to answer a reasonable question, and I decidedly, for one, say the law will protect me in committing him to prison.’

“*Judge Capron.* ‘Well, Mr. Thayer knows he will be acting on his own conscientious belief.’

“Question (by Judge Capron). ‘What is Mrs. Cunningham’s name?’

“A. ‘Emma.’

“Q. ‘Do you know Mrs. Emma Cunningham?’

“A. ‘I know the lady you speak of.’

“Q. ‘The one Mr. Chatfield has been speaking of?’

“A. ‘I have not heard his testimony.’

“Recorder. ‘Well, we will state Mr. Chatfield’s testimony. Mr. Chatfield states that you called upon him about a month after the 22d of October last, and stated to him that on the day previous Mrs. Cunningham had been to you to commence or revive suits which had been discontinued against the doctor for breach of promise of marriage. That is the substance of it.’

“Mr. Clinton. ‘Mr. Chatfield stated he thought that was so.’

“Judge Capron. ‘I don’t want to ask you anything between your client and yourself. I don’t raise that question. I want to ask you simply as to that time. That is not a question which you can, as we think, claim to refuse to answer.’

“Recorder. ‘Neither is the other, it being collateral and not pertaining to the matter.’

“Judge. ‘I think that it is so. Still, I would not raise that unnecessarily.’

“Recorder. ‘Counsel is not protected if the matter inquired of be collateral.’

“Judge. ‘I want to ask you on what time it was that this lady came to you either to recommence those suits that you commenced for her previously, or to revive them, whichever was the case?’

“Witness. ‘In the first place, the suits that were commenced were simply discontinued in October—I think it was the twenty-second.’

“Q. ‘How long was it after that before she came to you to revive them—that is all we wish of you?’

“Witness (after considerable hesitation). ‘I cannot tell.’

“Judge. ‘Give us about.’

"*Witness* (after renewed hesitation). 'I cannot tell the particular date, but my impression is that *she said she did not know but she would have to revive them*. I don't recollect any date.'

"*Q.* 'About how long?'

"*A.* 'Well, it was some time afterward.'

"*Q.* 'Three or four weeks?'

"*A.* 'In the neighborhood of that, perhaps.'

"[This admission created the greatest sensation throughout the entire audience.]

"*Judge Capron.* 'That is all.'

"*Q.* 'One of these suits was for breach of promise of marriage?'

"*A.* 'One was for breach of promise of marriage; the other was for slander, for charging her with taking this note.'

"*Witness* went forward to sign the deposition, and on looking it over said: 'I don't say there was any suit ever commenced again.'

"*Recorder.* 'She said for the purpose of recommencing them?'

"*Witness.* 'She never called for the purpose of recommencing them; she never called for that express purpose.'

"*Judge.* 'That is no matter; if she incidentally said it it would answer just as well. All that we want is whether she spoke of recommencing them.'

"Whilst the witness was reading the Coroner's notes of his testimony and procuring some alterations to be made, Mr. Clinton bent forward to speak to the Recorder. The crowd, supposing he was endeavoring to whisper something to Mr. Thayer, shouted out, indignantly: 'No interference! No interference!'

"Mr. Thayer, in reading over his testimony, when he came to the sentence underlined, hesitated as if the statement had not been recorded precisely as he wanted. 'She did not,' he said, and hesitated—'she did not know but she would have to revive them.' [Great laughter and confusion.]

"*Coroner.* 'Order, immediately, or I will have the officers clear the room.'

Mr. Thayer desired to put himself upon his professional privilege and decline to answer. He proceeded so far as to say, "I am perfectly willing to tell everything that I can consistently with my situation." How far the tactics of intimidation were successful appears in the evidence of Mr. Thayer. The Coroner at once said that if "any man" refused to answer "a reasonable question"—that is, a question which he (the Coroner) considered "reasonable"—the law would protect him (the Coroner) "in committing him (the witness) to prison." As though the threat to send Mr. Thayer to prison was not sufficient, the batteries of Recorder Smith and Judge Capron were turned upon him. Both of these gentlemen, who were assisting the Coroner by conducting the examination of witnesses, were at the time Judges of the New York Court of General Sessions, which Court had jurisdiction in capital cases; and, in the ordinary course of proceedings, either of them might thereafter preside upon the trial of Mrs. Cunningham for her life in that Court. Both of these gentlemen solemnly and deliberately (at any rate, with *apparent* sincerity) took the ground that the consultation of Mrs. Cunningham in respect to reviving the breach-of-promise case—or commencing a new suit—was not privileged. Recorder Smith declared that it was a *collateral* matter, and, therefore, not privileged. To this doctrine Judge Capron assented, although his favorite ground was that the testimony merely related to a point of time, and therefore was not privileged. Both assumed that it had been legally proved that Mrs. Cunningham expressed to Mr. Thayer a desire to revive the breach-of-promise suit. They assumed that this was an established and undisputed fact—as much so as if the suit had been revived, tried in court, and a judgment entered of record; whereas there had been no proof, legal or otherwise, that Mrs. Cunningham ever expressed a desire to have the breach-

of-promise suit revived. There was simply evidence that Mr. Thayer had said so. They did not ask Mr. Thayer whether it was *true* that he had thus stated. The only thing established was what Mr. Thayer had said. There was not a word shown as to what Mrs. Cunningham had said. In answer to a leading and monstrously uncandid question—not as to what Mr. Thayer had said, but as to what Mrs. Cunningham had stated—the witness answered that his impression was Mrs. Cunningham had said “she did not know but that she would have to revive them” (the suits).

It was most extraordinary that the Recorder and Judge Capron should hold that the declarations of Mrs. Cunningham to one of her Counsel, and what was said by this Counsel in consultation with his associate Counsel, under the circumstances, appearing in evidence, was not privileged. Never before nor since has there been such a specimen of legal legerdemain exhibited by Judges who were performing for the time being as amateur lawyers. Their adroitness, added to the grim majesty of the Coroner threatening to send the witness to prison if he did not answer any “reasonable” question, had the effect of so confusing Mr. Thayer that his answers to a series of leading and misleading questions became very much mixed. The idea of reviving the breach-of-promise case never entered the head of Mrs. Cunningham. Nor did she—nor could she—have ever expressed or conveyed, or intended to convey, any such idea to Mr. Thayer. That she was married on the 28th of the preceding October to a person who claimed to be Dr. Harvey Burdell was a fact undisputed. If some one personated Burdell, certainly she after that could never have thought of reviving the breach-of-promise case against him, and thus bring before the public the fraudulent marriage. If she was so keen that according to the opinion of Dr. Burdell, as testified to by one of

the witnesses, "she could outwit the devil," surely she would not suddenly turn idiot, and commence a breach-of-promise suit against him after the 28th of October.

The testimony of Mr. Chatfield and Mr. Thayer took Mr. Clinton by surprise. As soon as practicable he inquired into the facts, and found them to be substantially as follows: The breach-of-promise and slander suits were settled, not through the lawyers, but by the parties themselves, Dr. Burdell and Mrs. Cunningham, on condition that they should be married, and that for a certain time the marriage should be kept secret. Dr. Burdell insisted—and it was agreed—that it should not only be kept secret from the whole world, *but from Mr. Thayer in particular*. Until the murder of Dr. Burdell, Mr. Thayer knew nothing of the marriage. After the marriage Dr. Burdell desired that the judgment against his brother, William Burdell, which had been assigned to Mrs. Cunningham, should be by her assigned to him. She consulted with Mr. Thayer, and put to him the hypothetical question: "Suppose a lady is married, can she make an assignment of a judgment, or any assignment, using her former instead of her married name?" He told her that the proper way was to use the married name; but if there were no doubt about the identity of the person, if the former name were used, the assignment would be valid. She accordingly assigned the judgment to Dr. Burdell, using the name of Emma A. Cunningham. It was in reference to this she consulted Mr. Thayer at the time, and not in regard to the breach-of-promise case. Mr. Thayer may have suspected that the marriage followed soon after the discontinuance of the suit; and had he interrogated her on the subject she would have been likely to divert his attention by some remark which assumed that there had been no marriage. Much other evidence was given showing or tending to show that Dr. Burdell talked and acted as if

he were not married. This was not strange in view of the fact that it was agreed between him and Mrs. Cunningham that the marriage should be kept secret until the summer of 1857.

But whether they were or were not married, the subject whether the relations existing between them were friendly or hostile was important. Considerable evidence was given for the purpose of showing that they were hostile. This testimony consisted mainly of declarations of Dr. Burdell in the absence of Mrs. Cunningham. This was hearsay, and would not be admissible upon a criminal trial. Witnesses were permitted to state not only what Dr. Burdell had stated, but what they had heard other people had said. As there was no one to cross-examine witnesses or to object to evidence, and as there was no attempt to apply and enforce the rules of evidence, the widest latitude prevailed. While Mr. Clinton attended the inquest from beginning to end, he determined from the start to take no part in the proceedings, as he did not desire that he or his clients should be in any way responsible for anything that was done there. In view of the peculiarities of Dr. Burdell, it was remarkable that there was not more evidence of his hostile declarations in respect to Mrs. Cunningham. On the subject of Dr. Burdell's peculiarities Mr. Blaisdell testified as follows :

“Dr. Burdell is a peculiar man ; he will have a quarrel, say, at this hour, and the next hour be pleasant ; he was very passionate, and quick over it, and very friendly, which accounts probably for the many settlements with Mrs. Cunningham ; he had many quarrels with her, as he stated to me, and afterwards settled them.”

The witness said that Dr. Burdell, in speaking of his difficulties with Mrs. Cunningham, talked in the hall loud enough for any one to overhear. The witness add-

ed: "Dr. Burdell, let me tell you, whatever he had to say, talked right out; it made no difference to him whether a thousand were present." Rev. Dr. Cox, in speaking of Dr. Burdell's peculiarities, said: "I should characterize him as an amiable man, subject to peevish fits that subsided immediately."

Mr. Blaisdell, in his testimony, said:

"Dr. Burdell had a great many enemies. * * * Nearly all the difficulties he has had have grown out of money matters; he was one of the most extremely penurious men that ever lived. A penny looked bigger in his eyes than a twenty-dollar gold piece to some people."

Mr. Blaisdell testified that Dr. Burdell began a year before his death to talk with him about his troubles with Mrs. Cunningham. The witness stated that Dr. Burdell informed him that within the last month he had difficulties with her; he said she had taken some of his papers which were of vital importance to him, and asked what he should do, to which the witness replied that he ought to get rid of her. The doctor said he was going to do so. The witness also stated that Dr. Burdell told him on last Friday that his life was threatened by those in the house. This remark referred to Mrs. Cunningham, her daughter, Eckel, and Snodgrass. Dr. Burdell stated that lately they had acted very strangely towards him, and annoyed him in every way; that the doors had been bolted against him, and when he remonstrated "they would abuse him, and tell him that it was nothing more than he deserved—that he ought to have his head broke." The witness testified that he thought Mrs. Cunningham heard Dr. Burdell say that day he was afraid of his life. Mr. Blaisdell testified that in a conversation he had with Dr. Burdell on Friday, the last day of his life, he said to the witness, "I want you should come and stay with me; I want you to come to-night;

I am afraid to stay ; I am very melancholy, and I don't know the reason, except these circumstances, and I want you to come."

Dimis Hubbard, a cousin of Dr. Burdell, who had lived in the house, 31 Bond Street, and of whom Mrs. Cunningham was jealous, testified that on the last Friday Dr. Burdell told her that he had trouble with Mrs. Cunningham, and wanted to get rid of her, but she had a lease of the house until the 1st of May ; that he showed her a lease of the house to Mrs. Stansbury, which was ready to be signed. The witness testified that two or three weeks before his death Dr. Burdell told her that Mrs. Cunningham threatened to take his life if he told something in regard to her daughter, and that upon being so threatened he said to her that he had already told this to the witness. Mrs. Mary Stansbury testified that in an interview with Dr. Burdell on that last Friday he said that the agreement to lease her the house from the 1st of May was ready, and if she would call the next day it would be signed. She stated that she went all through the house that day and examined the different rooms, and that Dr. Burdell told her that Mrs. Cunningham was a very bad woman and would do anything. Mrs. Mary Crane testified that she had known Dr. Burdell about twelve years, and that on Monday, the week before his death, she had an interview with him at his house, in which he said :

"That he had let his house to a lady, and that she was the most horrible woman he ever met ; he said she was very artful, and she was capable of doing anything to accomplish what she undertook ; he told me that he suspected foul play, and that he did not like the way they were prowling about the house at night ; he mentioned no name to me whatever ; he said they were prowling about the house at night, and that he had lost papers ; that the key of his safe was gone,

and indeed that nothing was private with him. He said : 'Thank Heaven ! I will get rid of them all on the 1st of May.' *He said also that she would outwit the devil ; that he would rather be in the hands of the devil himself than in the hands of a woman like her ; he seemed very much annoyed and troubled, and he said he would never make a contract with another woman.*"

Rev. Dr. Cox testified that on the last Friday Dr. Burdell told him he had let the house, 31 Bond Street, to Mrs. Stansbury. Mr. Blaisdell testified that on that same Friday Dr. Burdell desired to let the house to him, and urged him to come and live there after the 1st of May. The peculiarities of Dr. Burdell in making contradictory statements of the same facts to different persons was testified to by Dr. W. B. Roberts, who was his confidential friend. Dr. Roberts testified as follows :

Question. "He [Dr. Burdell] was frank with a friend?"

Answer. "Yes."

Q. "Then if he had particular domestic relations he would be likely, as a friend, to talk with you on the subject?"

A. "Yes. There were a great many things the doctor would say I never could account for; for instance, in letting his house to Mrs. Cunningham, a few weeks previous to May [1856], I asked him if he had let the house, and he said 'No'; he said that Mrs. Cunningham wanted the house, and that he would not let her have it; for, said he, 'Any one I like as a friend I do not want to have as a tenant'; now I see by the papers that the lease was made out to her in March; that he should speak in that way I cannot account for; yet we had that conversation; *there are other things of the kind which I cannot account for.*"

Cyrenious Stephens testified that in January, just before the murder, Dr. Burdell said to him that he had

worked hard and got a great deal of money, and, said he, "I am actually afraid to stay in my own house." Other witnesses testified to conversations with Dr. Burdell in which he referred to Mrs. Cunningham in terms more or less derogatory, while, according to the evidence of other witnesses, he evinced a great regard for her, and referred to her in terms of respect.

CHAPTER II

CUNNINGHAM-BURDELL MURDER CASE (CONTINUED)

Proceedings of Mr. Clinton before the Coroner to Enforce his Rights to See and Consult with his Clients.

PRIOR to the seventh day of the inquest Mr. Clinton had not been able to have a sufficient interview or consultation with his clients, Mrs. Cunningham, Eckel, and Snodgrass. They were confined in the house, 31 Bond Street, and no one was allowed to see them except by the permission of the Coroner. As already stated, Mr. Clinton, immediately after he was retained by Mrs. Cunningham, the day after the murder was discovered, went to 31 Bond Street, and had an interview with her which was of perhaps five minutes' duration. On Monday, the 2d of February, he saw her for a few minutes. As he came down-stairs the Coroner objected to his having gone up to see her. The following account of the incident is given in the report of the proceedings in the New York *Daily Times* of February 3, 1857:

“At the outset of the investigation an unseemly wrangle occurred between the Coroner and one of the Counsel for the parties in custody. The Coroner did not reach the house until about an hour after the time fixed for the inquest, when a large number of persons had collected, including a portion of the jury. The house was in charge of Captain Dilkes, who had ordered the rooms on the second floor to be closed and all persons excluded. Mrs. Cunningham, with one or two others in custody, were in a room upon the

third floor, and a portion of the jury went up-stairs to see them. Mr. Clinton, who had been retained as their legal adviser, told the policeman in charge of the stairs that he was their Counsel and desired to go up. He was at once permitted to pass. When the Coroner came and was told that a number of persons were in the upper rooms with the parties, he said that the police had not done their duty—that he had ordered everybody to be excluded from those rooms but the jury, and that all others must at once be dismissed. The police enforced the order; and as Mr. Clinton with several others were descending the stairs, the Coroner, in rather a loud voice, said that the house was in confusion, that his orders had not been carried out, and that nobody had any business whatever in those rooms. Mr. Clinton explained that he went up as the Counsel of the parties, and had a right to an interview with them.

“The Coroner said the Counsel should have all his legal rights, but he would not allow anybody to go stealthily into those rooms for the purpose of talking to the parties.

“Mr. Clinton said he would not allow the Coroner nor anybody else to accuse him of doing ‘stealthily’ what he had a perfect right to do. He had gone up there for an interview with his clients, which the law allowed them and him the privilege of having, and he had done it openly.

“The Coroner said he had no right to go up contrary to his orders. He had directed everybody to be excluded.

“Mr. Clinton said he would test the legal right of the case, but he denied that he had gone up otherwise than with the assent of the police, and he demanded whether the Coroner meant to charge him with having gone up ‘stealthily.’

“The Coroner said no; he did not make the remark with any design to apply to him, but he would let them all understand *that he knew a thing or two about law* as well as the rest.

“The conversation, which had been carried on in a loud tone and in presence of a large crowd of persons, was here dropped, and preparations were made to continue the inquest.”

Mr. Clinton was fully aware of his legal right to see and consult with his clients as freely as he desired at any reasonable hours ; but he thought it best on the whole not to enforce that right for some considerable time. The Coroner denied him the privilege of seeing his clients except in his (the Coroner's) presence, or in the presence of some one representing him. Mr. Clinton thought the wiser course was to permit the Coroner to have full sway (practically confining the inmates of the house as prisoners) in his efforts to search and examine all parts of the house and everything in it, in order to obtain evidence that might aid in discovering the perpetrators of the murder. Mr. Clinton therefore delayed until the seventh day of the inquest to take active measures to compel the Coroner to permit him to have a private consultation with his clients. The *New York Daily Times* of the 7th of February, 1857, in its report of the proceedings of the previous day on the inquest, gives the following account of what occurred between Mr. Clinton and the Coroner :

“MRS. CUNNINGHAM’S COUNSEL DEMANDS AN INTERVIEW WITH
HIS CLIENT

“Animated Discussion between Mr. Clinton and the Coroner.

“Mr. Clinton, Counsel for Mrs. Cunningham, at this period approached the Coroner and said :

“‘Will you pardon me, sir, for interrupting the proceedings, as the Counsel for Mrs. Cunningham ? After consulting with my associates and others, I now demand to know by what order, commitment, or process, verbal or otherwise, Mrs. Cunningham is detained by you. The law gives us the right to know that, and we demand it.’

“*The Coroner.* ‘She is detained by me, as every other witness is detained to whom the slightest suspicion is attached in the occurrence, and she is kept for further examination.’

"*Mr. Clinton.* 'Is there any written process of any kind whatever?'

"*The Coroner.* 'Any written what?'

"*Mr. Clinton.* 'Any writings, any order of commitment, or anything of that kind by which she is detained, or is it by a verbal order given to the Captain of Police?'

"*The Coroner.* 'By a verbal order.'

"*Mr. Clinton.* 'I have another demand to make, and that is that my associate and myself be now allowed to confer with her long enough to enable her to make an affidavit. A Commissioner is in attendance for that purpose.'

"*The Coroner.* 'I would ask the purport of that affidavit?'

* * * * *

"*Mr. Clinton.* 'I have no objection to state the purport of that affidavit. She may swear to facts which you have just stated in regard to her detention, and to the prohibition on your part of her seeing her Counsel. She may testify to the fact that she is restrained of her liberty by you, without color of law, and without authority, to the end that your power in the premises may be reviewed by a higher judicial tribunal. The law provides that any person is entitled to a *habeas corpus*. A very serious offence is committed by the man who interferes to prevent a party from exercising that right. Writs of *habeas corpus*, I suppose, are already issued for some of these parties. As her Counsel, I wish to see her on this subject. I consider that you have acted contrary to law in denying me the right to see her. Whether you are right, or I am, will be very speedily decided.'

* * * * *

"*Coroner.* 'I will submit now to all the action you will take on the *habeas corpus*. I leave myself to the citizens of New York to protect me in the honest discharge of my duty.'

"*Mr. Clinton.* 'I think that is the best course to take.'

"*Coroner.* 'I will bow myself to the law in any shape in which it is properly presented to me, and the moment I hear

it. As soon as you get a *habeas corpus* you shall have access to your client.'

"*Mr. Clinton.* 'The law gives us that.'

"*Coroner.* 'Yes, but I don't know whether the law will give it to you.'

"*Mr. Clinton.* 'Well, let the law test that.'

CHAPTER III

CUNNINGHAM-BURDELL MURDER CASE (CONTINUED)

Mrs. Cunningham and her Two Daughters, Augusta and Helen, Eckel, and Snodgrass Brought before Judge Brady, of the New York Common Pleas, upon Writs of *Habeas Corpus*.—Proceedings before Judge Brady on the Return of the Writs.

MR. CLINTON at once applied to Judge John R. Brady, of the New York Common Pleas, for writs of *habeas corpus*, which he granted, requiring the Coroner to produce before him Mrs. Cunningham, her two daughters, Eckel, and Snodgrass.

The following account is given in the New York *Daily Times*, February 9, 1857, of the proceedings before Judge Brady upon the writs of *habeas corpus* granted by him :

“In accordance with the writs of *habeas corpus* issued on Friday from the Court of Common Pleas, John J. Eckel and George Snodgrass were produced by the Warden of the City Prison in the Court on Saturday morning.

“The writ for Eckel is subjoined :

“*‘The People of the State of New York to John Gray, Warden of the City Prison of the City of New York, Greeting :*

“*‘We command you that you have the body of John J. Eckel, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said John J. Eckel shall be called or charged, before Honorable John R. Brady, one of the Judges of the Court of Common Pleas for the City and*

County of New York, at the Chambers of the said Court of Common Pleas, in the City Hall, in the City of New York, on the 7th day of February instant (1857), at ten o'clock in the forenoon, to do and receive what shall then and there be considered concerning him, and have you then there this writ.

“‘Witness, Honorable Thomas W. Clerke, one of the Judges of the Supreme Court, at the City of New York, the 6th day of February, 1857.

“‘WILLIAM R. STAFFORD, Attorney.

“‘R. B. CONNOLLY, Clerk.

“‘By the Court.’

“The writ for Snodgrass corresponds with the above in every particular save the name.

“The room was crowded, the lobby in a great measure filled, and the stairs, portico, and City Hall steps were occupied by large numbers of expectant spectators.

“Judge Brady, accompanied by Judge Ingraham, took his seat on the Bench shortly after half-past ten o'clock. Snodgrass and Eckel were seated in the vicinity of their Counsel, in charge of two Sheriff's officers. The prisoners attracted general attention. Neither seemed very much annoyed. Snodgrass conversed freely, if not jocularly, with his friends. Eckel remained more impassive. The personal appearance of both has already and repeatedly been described. Eckel's appearance, it must be admitted, fails to give any serious indications of a murderous nature. Indeed, he is rather good-looking. The only unpleasant feature about him is his eyes. They are small, grayish-blue, rather protuberant, and bloodshot.

“The greatest anxiety was manifested to see the unfortunate woman who claims to be the wife of Dr. Burdell. The *habeas corpus* for her production was signed at half-past nine on Saturday morning, and made returnable at half-past ten. She was brought from her house in Bond Street in a closed carriage to the City Hall, and there kept in the Sheriff's office till three in the afternoon. In the meantime her friends

were debarred from all communication with her ; even her Counsel were refused access to her. She was seen by no one but the Sheriff and his officials.

“The petition on which the *habeas corpus* in her case was granted is to this effect :

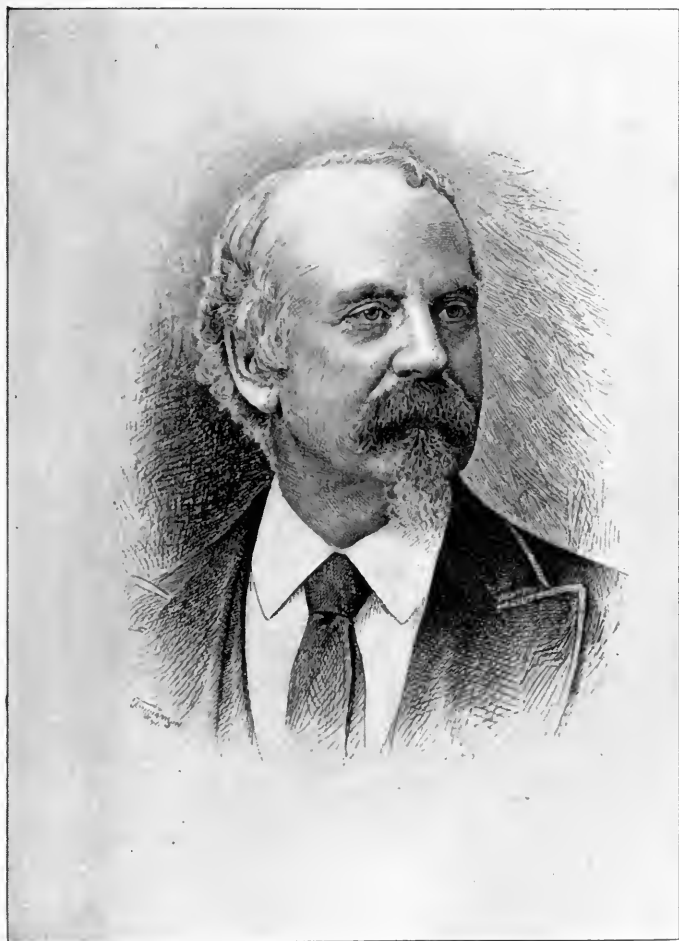
“*To the Hon. John R. Brady, one of the Judges of the Court of Common Pleas of the County of New York :*

““The petition of Henry L. Clinton and B. C. Thayer, Counsel for Mrs. Emma Augusta Burdell, who is restrained of her liberty, at No. 31 Bond Street, in the City of New York, by Edward D. Connery, one of the Coroners of the City of New York, respectfully shows that she is not committed or detained by virtue of any process issued by any Court of the United States, or by any Judge thereof ; nor is she committed or detained by virtue of the final judgment or decree of any competent tribunal, of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree ; that the cause or pretence of such restraint of her liberty, according to the best knowledge and belief of your petitioners, is a verbal order given by said Connery to Dilkes, one of the Captains of the Police of said city, to confine her in the said house, No. 31 Bond Street, as a witness upon the inquisition now being held by said Connery, as Coroner as aforesaid, to inquire into the cause of death of the late Harvey Burdell ; and your petitioners further represent that said Connery also restrains said Mrs. E. A. Burdell of her liberty in this, to wit : That he refuses to allow her a private consultation with your petitioners, as her Counsel ; that the illegality of her imprisonment, as your petitioners believe, consists in her detention as aforesaid without any written process of any kind, and without the liberty of private consultation with your petitioners as her Counsel ; wherefore your petitioners pray that a writ of *habeas corpus* issue to the said Edward D. Connery, commanding him to bring Mrs. E. A. Burdell before your Honor, and return the cause of her imprisonment.

““H. L. CLINTON,

““Dated February 7, 1857.

““B. C. THAYER.



HON JOHN R. BRADY

Judge of the Court of Common Pleas of the County of New York. (Afterwards
Judge of New York Supreme Court)



“‘*City and County of New York*, ss.:—Henry L. Clinton and B. C. Thayer, each severally being duly sworn, doth depose and say, each for himself, that the facts set forth in the above petition subscribed by them are true.

“‘H. L. CLINTON,

“‘B. C. THAYER.

“‘Sworn before me this 7th day of February, 1857.

“‘JNO. H. CHAMBERS, *Commissioner of Deeds.*’

“Mr. A. Oakey Hall, the District Attorney, said: ‘If your Honor please, I have received the ordinary and appropriate statutory notice in a *habeas corpus* case of a person detained upon a criminal matter, and am requested by the Warden of the City Prison, to whom the *habeas corpus* writ was addressed, to present to your Honor the return; and in obedience to the writ (which is already familiar to your Honor, as I see your writing upon the back) he returns as follows:

“‘I, John Gray, Warden of the City Prison of the City of New York, do return to the annexed writ of *habeas corpus* that the said George Snodgrass in the said writ named is in my custody; that he was placed in my custody on the 4th day of February, 1857, and that I so hold and detain him in my custody by virtue of a certain commitment, a true copy of which is hereto annexed, and the original of which I now produce, together with his body, before your Honor.

“‘JOHN GRAY, Warden.

“‘The Keeper of the City Prison and Bridewell will keep for examination the body of George Snodgrass, until further notice, apart from any other witness.

“‘ED. D. CONNERY, Coroner.

“‘NEW YORK, *February 4*, 1857.

“‘I will read from the original. There is also another and similar writ, with a similar return, with the exception that the name is John J. Eckel; and the commitment, which is very much varied, is as follows:

“‘The Keeper of the City Prison and Bridewell will keep for examination the body of John J. Eckel until further notice.

E. D. CONNERY, Coroner.

“‘NEW YORK, *February 4*, 1857.

“ ‘In thus presenting these two returns, I suppose my duty, for the present, ends.’

“*Judge.* ‘What is the return, if you please, in the case of Eckel?’

“*District Attorney* (after again reading the last commitment). ‘In the case of Snodgrass, the Coroner evidently treats him as a witness, because the commitment says, “to keep him apart from any other witness;” whereas, in the case of Eckel, he is to be kept “until further notice.”’

“Mr. Clinton said that, as Counsel for both of those parties, he thought, after consultation with his associates, that they would demur to both of the returns put in, and, if the District Attorney would be kind enough to consider them as demurring, without the trouble of submitting the demurrer in writing, he would be much obliged to him. He supposed he (the District Attorney) would have no objection to that.

“*District Attorney.* ‘None at all, sir.’

“*Mr. Clinton.* ‘I will then move for the discharge of these parties on the papers now before your Honor. And, first, in reference to Snodgrass. The commitment against him is palpably illegal, and of no effect whatever. In the first place, the Coroner has no power to commit at all in such cases. I have not a copy of the Second Revised Statutes in Court, but I can give your Honor a reference to the section. The page is 925 of the fourth edition, and, if I recollect correctly, the sixth section—which, by-the-way, is correctly set forth in one of the papers to-day. That is the only section in the article in relation to the proceedings on a Coroner’s inquest which gives him any power whatever to detain parties or witnesses. That section provides that after a verdict by the Coroner’s Jury, if by that verdict it shall be established that some one has come to his death by foul means—that is the substance of the Statute—then he may arrest parties on the charge of homicide, and he may also require witnesses to recognize for their appearance at the next term of the Oyer and Terminer, or of the Sessions to be held in the county, after the final determination of the proceedings be-

fore the Coroner. Again, though the Coroner had the power to commit, the commitment in this particular case is of no effect whatever. It shows no cause for restraining a party of his liberty upon the face of the paper itself. He does not state whether Mr. Snodgrass is to be kept for examination as a witness or as a defendant. Again, the commitment does not state that these proceedings are taken upon the oath of any party; *non constat*, it is a mere whimsical exercise of discretion on the part of the Coroner. I say that he had no jurisdiction to commit at all; and if he had, there is nothing stated in this commitment which shows a legal cause for restraining a party of his liberty. I do not know that Mr. Snodgrass's cause requires any elaborate argument. I think it is so clear upon the face of it that the mere statement of the points and of the Statute is sufficient to entitle him to his discharge. As the Counsel, however, for Mr. Snodgrass I will say that if there be anybody in this city or elsewhere who wishes—if there be any responsible officer who desires to examine him—who wants to take up any investigation as to the cause of the death of Dr. Burdell, and wishes to examine him, he does not shrink from any examination; he is willing to submit to it. But he has been examined as a witness in the proceedings now pending before the Coroner on two several occasions. He has been examined fully, and I see no reason why he should be further deprived of his liberty. I do not suppose any reasonable person for one moment believes that he had any complicity in that most foul and horrible of all the murders that have occurred in this city for a great many years. I therefore move for his unqualified discharge. If the District Attorney has anything further to say, perhaps I may have some remarks to make after he has been heard. I prefer to take up the cases separately.'

"*District Attorney.* 'I am handed by the Coroner another writ of *habeas corpus* issued by your Honor to which there is as yet no return, with the request that I make the return for him to sign. I state this as merely explanatory. I will send it to the Coroner in order that he may make the

proper return before your Honor. (To the messenger.) Hand that over to the Coroner, messenger.'

"*Mr. Clinton* (to the messenger). 'Has the party been brought down?'

"*Messenger*. 'Yes; down ten minutes.'

"*Mr. Clinton*. 'He is required to return the party at half-past ten; I suppose he should bring Mrs. Cunningham here.'

"*District Attorney*. 'I submit this matter of Mr. Snodgrass to your Honor without any argument, for the reason that it is patent on the face of the paper that he is held as evidence; and your Honor, as a Judge of a Court of Record, is too familiar with the rights of witnesses to need any argument from me on that subject.'

"*Judge*. 'I understand Mr. Clinton to move for the discharge of Mr. Snodgrass from all restraint as a witness.'

"*Mr. Clinton*. 'I do so, and if there is no doubt about the cause of the detention, I ask for a decision.'

"*Judge*. 'There is none about it; it is conceded that he is held as a witness, and the Coroner having no power to do so at this stage of the proceedings, the order is that he be discharged.'

"*Mr. Clinton*. 'I will say this in favor of Mr. Snodgrass, that if at any stage of this case Mr. Hall desires him as a witness, he will be forthcoming at any time he wants, and if he will only send me notice I will see that he is produced.'

"*Judge*. 'Mr. Hall may take any course in regard to that that he thinks proper.'

"*District Attorney*. 'I strictly confine myself to the legal matters arising in this case. As to the other commitment it would undoubtedly be more satisfactory if the Coroner had stated, as is very usual, and perhaps material, the nature of the reason for the holding of the party for examination. He simply says he holds for examination the body of John J. Eckel "until further notice." As your Honor is aware from these matters—matters sometimes coming before you on writs of *habeas corpus* or *certiorari*, alone or conjoined—

it is usually customary to add, "who is committed by me on a charge of so and so"—stating what it is for. But so far as we can infer legally from the face of this commitment, he (the Coroner) "holds for examination the body of John J. Eckel until further notice," charged with some sort of offence. Now, I suppose that your Honor and myself are confined to this commitment. We have no power to go beyond, or to inquire, except as a reasonable inference may arise on the face of the commitment, why and how he is held. If the Coroner holds Mr. Eckel by virtue of any magisterial belief, on his part, that a felony has been committed by Mr. Eckel, he might perhaps have authority to detain him until the examination of the Coroner's Jury is over, because any bond he might take, and any commitment he might make, would only be colorable up to that time.'

"Mr. Clinton asked the Judge to be kind enough to send an officer for the Revised Statutes, as he would like to call his friend's attention to their language; if it were not objected to he would refer to the extract as it appeared in the newspaper.

"*Mr. Hall.* 'Yes, I will accept that.'

"The Judge was understood to say that the Statute did not express in precise terms that the Coroner was authorized to hold persons on suspicion, but he felt very much disposed to favor the Coroner's decision in regard to his power to detain a suspected party as principal or as accessory until the labors of the jury should be concluded.

"Mr. Clinton contended that the Coroner's powers were prescribed by Statute; he had no power whatever to confine a party in custody, if he (Mr. Clinton) read the Statute right, until the jury had actually rendered their verdict. The section to which he referred was Section 6, and read as follows:

"'If the jury find that any murder, manslaughter, or assault has been committed, the Coroner shall bind over the witnesses to appear and testify at the next Criminal Court, at which an indictment for such offence can be found that shall be held in the County. And in such case, if the party

charged with any such offence be not in custody, the Coroner shall have the power to issue process for his apprehension in the same manner as Justices of the Peace.'

"That Statute clearly contemplated that the Coroner should have no power to make a commitment, except in the precise contingency spoken of. If Mr. Hall, who had conducted this case with his well-known courtesy, thought that there was enough to put Mr. Eckel on his trial, if he thought there was enough to justify the institution of an investigation before a police magistrate or other magistrate, he (Mr. Clinton) thought the proper course was to have the party held, not upon this commitment, but on one made out by a magistrate who had legally the power to do it. He (Mr. Clinton) wished to know, and it was for that purpose chiefly that they had brought up Mr. Eckel's case, whether he was now a party or a witness?

"The District Attorney said that that part of the section reading: 'And in such case, if the party charged for any such offence be not in custody, the Coroner shall have the power,' etc., had always seemed, in his mind, to imply a constructive power in the Coroner to take into custody during the investigation.

"*Judge.* 'That is what I want to hear read.'

"Mr. Clinton said that the words 'if he be not in custody' referred, he had no doubt, to a custody to which the party might be subjected by a responsible magistrate having the power to grant a warrant. 'If he be not in custody,' referred to a legal custody. And, besides, one of two things must appear, if Mr. Eckel was here as a witness, he was entitled to be discharged the same as Mr. Snodgrass. The only question, therefore, to commence with, was he (Eckel) detained as a witness or as a party? Now he (Mr. Clinton) would like that point settled between the District Attorney and himself at the outset. He submitted that there was nothing in the commitment showing that he (Eckel) was held any more as a party than as a witness. The commitment required that 'he be kept until further notice.' The very idea of 'further notice' implied that

he was temporarily committed there, probably as a witness. Besides, if there were any doubt in his Honor's mind upon that point, he (Mr. Clinton) did not know but that he had proof that he (Eckel) had been examined as a witness, and the Coroner had announced that he was to be recalled as a witness. After the demurrer he had introduced, it would not be exactly in order to introduce that kind of proof, but he would ask to introduce it if needful.

"*Judge.* 'It must be with the District Attorney to say whether Mr. Eckel is detained as a witness, or as a principal or accessory.'

"*Mr. Clinton.* 'If the District Attorney will say that he wishes him detained as a principal, and will get out the proper papers, I will stop my motion here. I have no idea that Mr. Eckel should escape on a mere technicality. My object in bringing this motion was to meet the case boldly. If he be a witness, he is entitled to be discharged; if he is a party, then he can no longer be examined as a witness. I wish to have his position defined, and it was in order that my learned friend might do so that I instituted these proceedings.'

"The District Attorney said he was about to make a suggestion—viz., that the *habeas corpus* be adjourned, and reference in the meanwhile made to the magistrate, in order that he might compel the return and state the grounds on which the prisoner was detained, thus making an amended return. He had been informed by the Coroner, officially, that he detained Eckel as a party suspected of an offence. It would be then very proper for the commitment to be returned to the Coroner in order to be amended.

"Mr. Clinton thought the District Attorney and himself would agree. He evidently supposed that Mr. Eckel was to be detained as a party, and he (Mr. Clinton) would ask him if that was not his position.

"The District Attorney so inferred from the official communication of the Coroner.

"*Mr. Clinton.* 'Well, if that be so, I take it for an official announcement, so far as it goes, as to the position of Mr.

Eckel. But the District Attorney asks for an adjournment in order that an amended return might be brought in.'

"*District Attorney.* 'No, I don't ask it; I merely make the suggestion.'

"*Mr. Clinton.* 'Well, I have another suggestion to make in connection with that. If the case is adjourned I think it would be unfair for Mr. Eckel, while in this condition of neither party nor witness, to be called up as a witness in this investigation any further. I think it would be unjust, if he is to be put on his trial; and it is now announced that he is regarded as a party. If your Honor adopts the suggestion of the District Attorney, and adjourns the case, I suggest that your Honor should direct that Mr. Eckel be kept in custody during the adjournment of the Court, and that he be kept there, and there alone, because he (Counsel) did not think that if Mr. Eckel was to be detained as a party it was fair or right for the Coroner to jerk him up as a witness, and then—'

"*Judge.* 'That will not be necessary. I announced that it is Mr. Eckel's right, if detained as a party, to refuse to answer as a witness. Not knowing whether he is detained as a witness or as a principal, he may decline to answer any question as a witness, although put on the stand.'

"*Mr. Clinton.* 'I understand it to be announced to the District Attorney, officially, that the Coroner regards him as a party. I only want his (Eckel's) position to be put in a responsible shape, so that I may advise him what course to pursue. If he is now, in fact, a party, it would be improper and unjust, he having been once examined, to put him on the stand as a witness. If he is not a party, and if there were no predetermination to make him a party, I would offer him for examination and let the Coroner and the jury examine him to their hearts' content. But under this announcement, I take it, he is to be regarded as a party. To what time do you suggest an adjournment?'

"*Judge.* 'I suppose the interval between this and Monday morning would be sufficient time for the Coroner to make up his mind whether he detains this person as a principal or as a witness.'

"*Mr. Clinton.* 'I think that under the circumstances my client's position being a peculiar one, it would be but proper to direct that when he is remanded he be detained in custody, and there alone, until he is again brought before your Honor here on Monday morning.'

"*Judge.* 'He will be remanded to the City Prison, pending this *habeas corpus*. After the adjournment he is subjected to the same custody as before.'

"*Mr. Clinton.* 'My idea was that the order be so made that the Coroner would not have the right to take him out in the meantime for any other purpose.'

"*Judge.* 'I don't wish to make any such order as that, and I must decline doing so. Mr. Eckel has the right to refuse to answer any question that may be put to him now.'

"*Mr. Clinton.* 'He has that right under any circumstances.'

"*District Attorney.* 'If Mr. Eckel be returned "held as a witness," of course the ruling as applied to the case of Snodgrass applies to him. If, on the other hand, the Coroner detains him on any particular charge, we will have the benefit of learning the direct form of it.'

"*Mr. Clinton.* 'If your Honor please, I think the return should be made in the afternoon. He has now been in custody a week.'

"*District Attorney.* 'There will have to be an adjournment in the case of Mrs. Cunningham, or Mrs. Burdell, as the writ recites, for the Sheriff has her in custody down-stairs by my request, so that she might escape any curiosity. We can go on just as well without her actual presence as with it; but there is no return; I have drawn the return down to the words "held as"—so and so. I do not know the position of the Coroner in regard to her, and have sent the return to him to sign after properly filling it out. There will, therefore, have to be an adjournment, at least in regard to that case, till sometime to-day or Monday.'

"*Judge.* 'Then we will adjourn till three o'clock.'

"*Mr. Clinton.* 'In the meantime where will Mrs. Burdell be kept? Down-stairs?'

“District Attorney. ‘She will probably be kept in the same custody as she now is.’

“Mr. Clinton. ‘Before your Honor adjourns, I wish it distinctly understood that between this and our meeting again this afternoon there shall be no further obstructions to the right of consultation on our part with Mrs. Burdell. Every Judge and every lawyer knows that a client has a right to consult freely with her Counsel under such circumstances. And your Honor is perfectly familiar with the fact that from the time of her arrest up to the present time I have not had an opportunity of having any consultation with her of any amount. The Coroner has insisted on being present to listen to every word that was said, and even yesterday called in several police officers to listen. Now, until the adjournment this afternoon, I would thank your Honor for an intimation that the Counsel shall have a perfect right to consult with her as much as she pleases.’

“Judge. ‘There is no dispute about that, Mr. Hall.’

“District Attorney. ‘Not the slightest, sir. I suppose the Coroner would have a common-law right to keep witnesses, *quoad* witnesses, apart, but it may be that this lady has rights of her own to look after, as, for instance, if she be, as she represents, the wife of the deceased. I, for my part, however, would have no possible objection to her seeing Counsel at any and all times.’

“Judge. ‘With regard to the right of Mr. Eckel and Mrs. Cunningham to see Counsel, it is only necessary to say that that is a constitutional right that ought not to be interfered with in the slightest degree. As a matter of course, she is entitled to and ought to have the benefit of consultation with her Counsel whenever she pleases.’

“District Attorney. ‘Will your Honor allow me an observation? My learned friend has made a remark as if I were connected with or responsible for these proceedings.’

“Mr. Clinton. ‘Not at all.’

“District Attorney. ‘Your Honor knows that I have my sphere of duties and the Coroner has his; and that I cannot interfere with him in any way whatever. Indeed, I

have no connection whatever with preliminary proceedings, unless, as in this case, I appear in reference to a *habeas corpus*.'

"*Mr. Clinton*. 'I never thought of holding you responsible for such outrageous proceedings as have been had before the Coroner. I know very well that *Mr. Hall* would never have sanctioned such a thing, directly or indirectly.'

"The annexed order was then made out :

"'Upon due hearing of the within writ of *habeas corpus*, and the District Attorney appearing in pursuance of the Statute, I now order the within-named George Snodgrass to be discharged.

"'JOHN R. BRADY, J. C. P.'

"Snodgrass was discharged accordingly, and thereupon was beset by congratulating friends.

"AFTERNOON

"An immense assemblage congregated in the vicinity of the Court-room at three o'clock, for the purpose of seeing the prisoners.

"The anxiety was increased by the knowledge of the fact that not only *Mrs. Cunningham* and *Eckel*, but the lady's two daughters, would be produced in Court, writs of *habeas corpus* having been issued and served on the Coroner for their return in the interval before the Court resumed.

"A strong posse of policemen and Sheriff's officers kept guard at the door of the court-room, and refused admission to every person not immediately concerned, or destitute of personal influence enough to secure an entrance irrespective of police authority.

"*Mrs. Cunningham*, *Miss Augusta* and *Miss Helen Cunningham* were brought into Court about a quarter-past three o'clock. Their entrance was the signal for a general neck-stretching rush, accompanied by an excited murmur, which was suppressed by shouts of order from the officers.

"The ladies took their seats by the side of *Mr. Clinton*,

their Counsel. Mrs. Cunningham removed her veil. She looked pale and exhausted, but gave no indications of nervousness or fear. Her daughters remained closely veiled.

"Mr. Clinton said that before the proceedings commenced regularly he wished to call his Honor's attention to a state of facts very extraordinary. His Honor recollected that at the adjournment of the Court he had announced, as he (Counsel) thought substantially in the form of an order, that he (Counsel) was at perfect liberty, together with his associates, to consult with his client during the interim before the Court resumed. The Deputy Sheriff, however, who had her in charge, acting as Deputy Coroner, having been requested particularly by the Coroner under no circumstances to permit her Counsel to say one word to her, requested him (Counsel) not to converse with her, to which he had acceded, in order to hold the Deputy Sheriff harmless. Having had no opportunity then of speaking to her, he would, with his Honor's permission, take the liberty of holding a brief consultation with her.

"*Judge.* 'Yes, undoubtedly that is your right.'

"The District Attorney explained that up to this time the respondent on this writ of *habeas corpus* had not made any appearance, and neither the people nor the relator had anything to do with it. There was no doubt that if Mrs. Cunningham had been before the Court her Counsel should have had access to her, whether anybody said yes or no. But his Honor's permission or instruction could only relate to Mr. Eckel.

"*Judge.* 'That is right enough.'

"*Mr. Clinton.* 'I waited, through courtesy to the gentlemanly Deputy Sheriff.'

"*Judge.* 'It is your right, and you may exercise it now by consulting freely with Mrs. Cunningham in reference to this matter.'

"Mr. Clinton entered into a whispered consultation with his client, in which he was occupied several minutes.

"The District Attorney then read the commitment in the

case of Eckel, as amended by the Coroner. It was as follows :

“The Keeper of the City Prison and Bridewell will keep for examination the body of John J. Eckel, until further notice, as a material witness before me as Coroner and a Coroner’s Jury, and on the suspicion of being implicated in the murder, or death by violence, of Dr. Harvey Burdell, at No. 31 Bond Street, in said City, on 31st January last, or 1st February instant, for further examination.

“E. D. CONNERY, Coroner.

“NEW YORK, *February*, 1857.’

“The matter, he said, came up, therefore, on the amended return.

“Mr. Clinton said he would take the same course which he had adopted in relation to the other return, and demur to it for want of sufficiency. He supposed Mr. Hall would consider the demurrer put in as before.

“The District Attorney assented. He had merely to add, as a suggestion to the Counsel, before he made any remarks to the Court, that if his Honor viewed the commitment as the commitment of a witness, he had no doubt but his Honor’s ruling of this morning would hold ; but if he supposed from the examination paper or examination commitment which was before him, that that was a matter of surplusage or might be treated as such, and that the party was really held by the Coroner upon a suspicion of being implicated in the murder, then he (the District Attorney) would have to ask that his views in regard to the power of the Coroner—if his Honor desired argument on that subject beyond the intimation he had given as to his opinion this morning—might be heard.

“The Judge did not see how it was possible for him to pass upon the character of this commitment. It seemed to be twofold.

“*District Attorney*. ‘It is so. It is what is called a duplicity.’

"The Judge. 'I am very much disposed to send it back to the Coroner to have it made specific.'

"Mr. Clinton addressed the Judge on the nature of the commitment, which he objected to on the same general grounds he had taken in his previous argument. Rather, however, than that Mr. Eckel should be discharged on a mere technicality on account of the blundering inefficiency of this officer, Coroner Connery, he would unite in the suggestion of his Honor to send the return back to him to be made more specific. Confident as he (Counsel) and his client were of the final result, they did not wish that he (Eckel) should escape on account of the miserable, the wretched, the contemptible, the disgraceful blundering of this man who had given them another written evidence of his stupidity, as though it were not plainly enough established already. He would, therefore, ask that the Court be adjourned for an hour or an hour and a half, with directions in the meantime to the Coroner that he was no longer to trifle with the Court, but that he should make a specific return, and take one ground or the other in reference to Mr. Eckel. It was proper that he (Counsel) should state that if the Coroner placed Mr. Eckel's detention on one ground or other before the finding of the jury, he should then ask that Mr. Eckel be discharged, so far as that commitment was concerned.

"The Judge. 'Perhaps your object may be accomplished by my holding that Mr. Eckel is entitled to his discharge as a witness, but must be held on the allegation contained in that return, that a suspicion is entertained of his being implicated in that murder.'

"Mr. Clinton asserted that such a view was in direct opposition to the Statute. He had been informed by persons experienced in the office of Coroner that the practice universally had been, when a party was suspected, to apply to some magistrate, and let that magistrate commit him until the jury found their verdict.

"The Judge understood that view of it, but Coroners had exercised the power, he thought, for a very long time.

"Mr. Clinton was not aware of it.

"The Judge said it was contemplated by that portion of the section of the Statute to which he had called the attention of the Counsel this morning. Although he did not find, on the examination of the books, any express authority for it, yet he supposed that the general fundamental principle that a citizen had a right to arrest another on suspicion of felony when a felony was discovered to have been committed, would apply to the case of a Coroner. Of course, the citizen was responsible for that arrest, and so, he thought, would be the Coroner.

"*Mr. Clinton.* 'The Coroner may have the same power as a private citizen, but as a Coroner he has certainly no such power as he has exercised here.'

"Eventually the Judge signed the following order :

"*Before Honorable John R. Brady, in the Matter of John J. Eckel :*

"Upon return of the writ of *habeas corpus* allowed by me in this matter, and after hearing Counsel for the said John J. Eckel, and A. Oakey Hall, Esq., District Attorney, for the people, ordered that the said John J. Eckel be remanded to the custody of the Warden of the City Prison, upon the ground solely of being held on suspicion as a party implicated in causing the death, by violence, of Harvey Burdell, and not as a witness, and thence not to be discharged except by due process of law.

"JOHN R. BRADY,
"Justice Common Pleas.'

"Mr. Clinton announced that Eckel being now made a defendant, he would not allow him to be put on the stand as a witness. Counsel wished it to be understood that he made this announcement on his own responsibility, and not at the wish of his client.

"The return in the case of Mrs. Cunningham was then read, as follows :

"I return to the within writ of *habeas corpus*, by me re-

ceived on the 7th day of February, 1857, at eleven o'clock, that I detain the said Emma Augusta Burdell, otherwise called Emma Augusta Cunningham, as an important witness, and as being suspected of being the perpetrator of, or connected with, the murder of Harvey Burdell, at No. 31 Bond Street, in the City of New York, on the 31st day of January last or 1st day of February, the said Emma Augusta Cunningham being the keeper of such house, as a boarding-house, and said deceased being a lodger in said house at the time of the murder; and complaint and information of said murder having been made to me, who then was and still am the Coroner of the City of New York, authorized to take proceedings in the case, who has taken such proceedings, summoned a jury of inquest according to law, and am now engaged in the investigation of said charge of murder before said jury, and I intend to examine her to-day or on Monday next as a witness, she being a material witness, and it being deemed important to examine her after the testimony of the other witnesses has been first taken.

“EDWARD D. CONNERY.

“Dated *February 7, 1857.*”

“Mr. Clinton wished to be understood as adopting the same course, and making the same general remarks, as he had thought proper to submit in the case of Eckel. He would ask that the decision, in her case, include or specifically decide that her Counsel should have the right to consult with her whenever they pleased, and that they should be permitted to enjoy the right of consultation, without the august presence of our great magnate, the Coroner, any of his officials, his policemen, or his dignified son John. [Laughter.]

“*Judge.* ‘The order will embrace all the points that you desire. The right to consult with her lawyer is a constitutional right, and must not be interfered with, to any extent, by the Coroner, or anybody else.’

“The order was made out as subjoined :

“Upon return of the writ of *habeas corpus* allowed by me

in the matter, and, after hearing Counsel for said Emma A. Burdell, and A. Oakey Hall, Esq., District Attorney, for the people :

“*Ordered*, That the said Emma A. Burdell be remanded to the custody of the Coroner, Edward D. Connery, at No. 31 Bond Street, in the City of New York, and there be detained until the rendition of the verdict of the Coroner’s Jury there assembled, to inquire into the death of Harvey Burdell, on the ground solely of being held as a party implicated in causing the death of said Burdell, and not as a witness ; and it is further

“*Ordered*, That her Counsel be allowed to consult with her privately, apart from said Coroner and all other parties, when and as often as they shall deem proper.

“JOHN R. BRADY, *J. C. P.*

“NEW YORK, *February 7, 1857.*’

“The petition on which the writs of *habeas corpus* for the daughters of Mrs. Cunningham were granted, is as follows :

“*To Hon. John R. Brady, one of the Justices of the Court of Common Pleas of the County of New York :*

“The petition of Henry L. Clinton and B. C. Thayer shows that Augusta Cunningham and Helen Cunningham are and each of them is restrained of her liberty at No. 31 Bond Street, in the City of New York, by Edward D. Connery, one of the Coroners of the City of New York, and that they are not, nor is either of them, committed or detained by virtue of any process issued by any Court of the United States, or by any Judge thereof ; nor are they, nor is either of them, committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree ; that the cause or pretence of such restraint of their and each of their liberty, according to the best knowledge and belief of your petitioners, is a verbal order given by said Coroner to Dilkes, one of the Captains of Police of said city, to confine them in said house, No. 31

Bond Street, in said city, as witnesses upon the inquisition now being held by said Connery, as Coroner as aforesaid, to inquire into the cause of death of the late Harvey Burdell, and your petitioners further represent that the illegality of their and each of their imprisonment, as your petitioners believe, consists in their and each of their detention as aforesaid, without any written process of any kind; wherefore your petitioners pray that a writ of *habeas corpus* issue, directed to the said Edward D. Connery, commanding him to bring the said Augusta and Helen Cunningham before your Honor and return the cause of their imprisonment.

“‘H. L. CLINTON.

“‘B. C. THAYER.

“‘Dated the 7th day of *February*, 1857.

“‘*City and County of New York*, ss.: Henry L. Clinton and B. C. Thayer, each severally being duly sworn, doth depose and say each for himself that the facts set forth in the above petition, subscribed by them, are true.

“‘H. L. CLINTON.

“‘B. C. THAYER.

“‘Sworn before me this 7th day of February, 1857.

“‘NATHANIEL JARVIS, JR., *Commissioner of Deeds*.’

“The Coroner’s return to the writs, as read by the District Attorney, was as follows :

“‘I hereby return to the within writ that the within named Augusta Cunningham and Helen Cunningham are detained by me as witnesses for further examination before me, who am a Coroner of the City and County of New York, and a Coroner’s Jury by me sworn to inquire into the cause of the death, by violence, of Dr. Burdell, who was found dead on the morning of the 31st of January last, about eight o’clock in the morning, at No. 31 Bond Street, in the City of New York—a boarding-house kept by the mother of the said persons detained by me, the mother being implicated in the charge of the murder of the deceased, and the circumstances developed tending to show that the said persons detained by me

are also either implicated, or know something in regard to the cause and manner of said death. Miss Helen, one of the persons detained, is now under examination before the jury aforesaid.

“‘ED. D. CONNERY.

“‘February 7, 1857.’

“In the course of the discussion which ensued in reference to the above return,

“The District Attorney asked his Honor to indulge him for a moment while he called his attention to a matter which had incidentally arisen in this case, and which he referred to more perhaps as *amicus curiae* than because it had any direct bearing on the case. In the case of *Garnett vs. Forrand*, 6th Barnwell and Creswell’s Reports, page 611, where an action was brought against the Coroner for excluding a person from the room, the decision says:

“‘It is argued, on the part of the plaintiff, that the Court of the Coroner is a public Court; that it is and ought to be open to the entrance of all his Majesty’s subjects, or at least of so many as the place will contain; and it is averred, and not denied on the record, that on the occasion in question there was room for the presence of the plaintiff. The Court was assembled for an inquest or a view of the body of a person lying dead. Now, it is obvious that such an inquiry ought, for the purpose of justice in some cases, to be conducted in secrecy. It is a preliminary inquiry which may or may not end in the accusation of a particular individual. It may be requisite that a suspected person should not, in so early a stage, be informed of the suspicion that may be entertained against him and of the evidence on which it is founded, lest he should elude justice by flight, tampering with witnesses, or otherwise. Even in cases where absolute privacy may not be required, the exclusion of particular persons may be necessary and proper. The power of exclusion is necessary to the due administration of justice. The Coroner should decide whether privacy be necessary or not.’

“I suppose, therefore, the Coroner has the right to exclude

witnesses from the room of the inquisition, and from other witnesses, but whether he has a right to exclude Counsel is another matter.

“*Mr. Clinton.* ‘I have not denied that the Coroner has the power of excluding me from his court-room, but he has not the right to keep me from my client.’

“The annexed order was then made in reference to the daughters :

“‘The order of the Court in the case of Miss Augusta Cunningham is that she be discharged. Miss Helen Cunningham’s examination to be resumed and continued by the Coroner, if he think proper, and she to attend for that purpose—she to be treated as a witness only, and not subjected to detention except while in attendance at the inquest to be examined.

“‘JOHN R. BRADY,

“‘*Judge Common Pleas.*’

“Mrs. Cunningham was remanded to No. 31 Bond Street, and was conveyed thither accompanied by her daughters, in custody of the Sheriff’s officers.”

CHAPTER IV

CUNNINGHAM-BURDELL MURDER CASE (CONTINUED)

Mr. Clinton's Object in the *Habeas Corpus* Proceedings Accomplished.
—Attempts to Compel Mrs. Cunningham and Eckel to Testify before the Coroner.

ONE great object of Mr. Clinton in the *habeas corpus* proceedings was to compel the Coroner to take the position that Mrs. Cunningham and Eckel were parties, and entitled to the rights of parties charged with or suspected of crime. This object was effectually accomplished. Mr. Clinton did not desire that they should be examined as witnesses before the Coroner. Any evidence they might have given in their own favor would have had no effect. Of course, both could have conscientiously testified that they were innocent of the murder. In fact, they had already testified before the Coroner and stated all they knew which was pertinent in the inquiry pending before him. Eckel, after giving his statement, said: "This is all I know about the matter." Mrs. Cunningham, in her testimony, had expressly said: "I don't know, either directly or indirectly, who were the perpetrators of the murder." After they had thus stated under oath that they knew nothing whatever with regard to the murder, the interests of their case could not be subserved by subjecting them to further examination. If there were no evidence against them, either direct or circumstantial, their denial under oath would have no greater effect than if not under oath. Whatever they might have testified to, other witnesses would probably have

testified differently. In their examination the Coroner, or whoever examined them, might have indulged in idle curiosity in respect to anything that ever occurred, or that was suspected to have occurred, with regard to them, from their birth up to that hour. All sorts of immaterial matters might and probably would have been inquired about, in order in some way to entangle and entrap them. In view of the course pursued by the Coroner, it would have been madness to expect that they would be fairly treated as witnesses. If they answered every question put to them to the satisfaction of everybody, they would gain nothing. The most that could be said would be that they had escaped injury by reason of their evidence; their position would be no better nor worse than before they testified. On the other hand, if they, in their confusion or excitement, unintentionally and innocently made the least slip in their testimony they might do themselves irreparable injury. A harsh and unfair construction would have been put upon their evidence. If, in collateral and unimportant matters, their testimony, though entirely candid and truthful, conflicted with the evidence of other witnesses, they would not be believed. In other words, by testifying before the Coroner, in the then heated condition of the public mind, they had *everything to lose and nothing to gain*. Mr. Clinton therefore took the responsibility of advising them not to testify. Many at the time thought that he erred. Although he had no doubt then, and has never had any doubt since, of their entire innocence, he believes that had he permitted them to testify there would have been danger of their ultimate conviction of murder.

In litigation it is wonderful how much innocent and honest persons damage their cases by talking too much. Mr. Clinton in his long experience has found that in important trials, among the greatest obstacles to overcome

have been the declarations and statements of his clients in respect to their cases. It has seemed as though the more meritorious their cases, the more obstacles of this kind he had to encounter. Clients are so anxious to have their friends and acquaintances think they are right in their legal difficulties that by their conversations they do themselves much damage. Even were their statements accurate and discreet, they are often but imperfectly remembered. Their listeners may carry in their memory only some fragments of the conversations; and may have these so mixed and confused as to convey (without intending to do so) a false meaning. Clients can do their cases no good—but much harm—by talking of them in advance of a trial. So well is this understood that when an important case is intrusted to him, the first thing a wise lawyer does is to enjoin his client not to talk about the facts. When a lawyer makes sure that his client will not do nor say anything to militate against his own case, the battle is half won. There can be no doubt that Mr. Clinton acted wisely in advising Mrs. Cunningham and Eckel not to testify before the Coroner. The following is an extract from the report of the proceedings before the Coroner, in the *New York Daily Times* of February 10, 1857:

“Mr. Eckel was then sent for. His entry into the room in charge of the officers was the signal for a general hush-up. So intense was the silence that the faintest whisper might have been heard.

“The prisoner bore himself very calmly, but with obvious effort. A close observer might have detected a tremulousness in his hands and an occasional twitching of the features, which, however slight, betrayed strong emotions under stern control.

“The Coroner rose and addressed him as follows :

““Mr. Eckel, you are called down here for examination. I must tell you, sir, as the Coroner, that the law leaves it in

your power either to reply to the questions I, or the Judge, or anybody else puts to you, or not.'

"*Judge Capron.* 'Whether he is, according to my view of the law, to be protected from answering, or is not to be protected, depends upon the relation which he holds to this proceeding. If he is here as a suspected party, of course he will have the rights of an accused; but if he is brought before this jury as a witness, then he only has the rights to which a witness is entitled, which are different from those to which a party is entitled. A party is not bound to answer any question whatever, whether it will or will not affect him. He has a right to stand mute. Not so with a witness. Whether he may refuse to answer a question without incurring the contempt of the Court, and subjecting himself to imprisonment for contempt, depends upon another question, and that is whether he can answer without impeaching himself. If he cannot answer a question without impeaching himself or give testimony which will tend to convict him, of course then he has a right to refuse to answer; but if he can answer any question put to him without that consequence following, then he has no right to refuse to answer; and if he does refuse, he is liable to be punished as for a contempt. Now I would, therefore, ask the Coroner whether he has called Mr. Eckel before him as an accused party or as a witness?'

"*Mr. Clinton.* 'By the proceedings on the return to the *habeas corpus* that question has been decided by making him a suspected party.'

"*Judge.* 'I drew that return. It says you (the Coroner) have held him in both capacities, and I made it say so on purpose. It says you hold him as a material witness and also as a person implicated.'

"*Coroner.* 'That is so, sir.'

"*Judge.* 'Well, then, you can call him here in either capacity.'

"*Mr. Clinton.* 'That part of the return as to his being held as a witness was regarded as surplusage.'

"*Judge.* 'I merely read the proceedings in the papers, and

the Judge did right, undoubtedly, or did what he supposed to be right, so far as he can bind us here. But he cannot control the Coroner in any respect as to the discharge of his duties.'

"*Mr. Clinton.* 'The Coroner is in—'

"*Judge Capron.* 'The Judge, on the *habeas corpus*, can either remand a witness or discharge him, and he has the right to state the ground on which he does that. Having done that, he has exhausted his power. When the party comes back before the Coroner he comes back as if he had never been before the Coroner, to be examined as a witness or to stand mute as a party. But the only difference between the two relations that the party holds to this tribunal is that which I have stated. If he is an accused party, and stands here in that condition, he has a right to refuse to say anything. Whether it will impeach him or not is no matter. He may stand mute and call on the people to make as good a case against him as they can. But when he is brought before the Coroner as a witness, he must submit to be examined, and it is for him to say whether he will answer without impeaching himself. If he says he cannot—'

"*Mr. Clinton.* 'I would suggest that there is nothing before the Court. I do this not professionally before the Court, but merely as a suggestion.'

"*Judge Capron.* 'Oh, yes, there is something before the Court, and that is whether Mr. Eckel is a party.'

"*Mr. Clinton.* 'I shall not take any part in the proceedings, but I will suggest the propriety of your proceeding to business.'

"*Judge Capron.* 'You will allow me to judge of that. That remark is certainly gratuitous. I have made these remarks, I will state, as advising to the Coroner, who called me in for that purpose, and I feel that they are strictly within the limits of my position.'

"*Coroner.* 'That is right, sir. (To the jury.) Well, gentlemen of the jury, I need not say anything further on the subject than that I put my words and expressions to the Court in the return to the demand for Mr. Eckel, as that he

was an important witness, and as being connected with the crime. That is, as you know, yourself, Counsel (to Mr. Clinton), the fact. I then say here that I order him now before me to fill one capacity, and that is as a witness. If he wishes to answer there is nothing to prevent him now.'

"*Judge Capron.* 'Mr. Eckel, I will ask you a few questions in relation to this matter.'

"*Coroner.* 'He has already been sworn.'

"*Judge Capron.* 'I will ask you, Mr. Eckel, when you last saw Dr. Burdell on the day preceding his death?'

"The prisoner handed the Coroner a document, and on resuming his seat said: 'That is all I have to say on that subject.'

"*Mr. Clinton.* 'The Coroner will read that paper. It will define Mr. Eckel's position.'

"*Coroner.* 'The Coroner will do his duty, sir.'

"*Mr. Clinton.* 'I merely made the suggestion.'

"*Coroner.* 'I will do it, you may depend upon it.'

"The Coroner perused the paper attentively, and then rose and said:

"'Gentlemen of the Jury, the letter put into my hands reads as follows:

"'“My position in this case, for the purpose of the investigation now pending before the Coroner and his jury, was yesterday judicially determined to be that of a defendant, charged with the horrible crime of murder, which, God knows, I am innocent of. I shall, therefore, by advice of my Counsel, decline answering any questions whatever. Whatever I have to say will be reserved for another and more appropriate occasion.”’

"*Mr. Clinton.* 'Mr. Coroner, I would state here that "yesterday" in the paper just read means Saturday.'

"*Coroner.* 'Yes, of course it means Saturday.'

"*Judge* (to the reporters). 'Then the reporters may strike out "yesterday" and put in "Saturday." (To the Coroner.) That paper, Mr. Coroner, states the determination was made by a Court, or something to that effect. He (the prisoner) means by that, I suppose, the Judge at Chambers? (To Mr.

Clinton.) It was a proceeding by a Judge at Chambers; was it not, sir?"

"*Mr. Clinton.* 'I do not take any part in these proceedings unless you consider me as talking to you individually.'

"*Judge.* 'Well, you did take part in them just now.'

"*Mr. Clinton.* 'I considered that I was then talking to you individually.'

"*Judge.* 'Well, I did confer with you at your own instance. I now say, I suppose that was a proceeding at Chambers.'

"*Mr. Clinton.* 'Well, I suppose it was.'

"*Judge.* 'He supposes, then, that because the Judge decided that he stood in the relation of a suspected party here, he therefore is right in refusing to answer. He don't say in that paper that he regards himself so at all. Now it strikes me that he is bound to answer that question, or to state why he does not answer it. He was called here as a witness.'

"Mr. Clinton went forward and entered into a conversation with Judge Capron and the Coroner, which was inaudible to the public.

"The Judge eventually said:

"'The Coroner has a right to commit him if he does not answer that question. The idea that this Coroner is tied up by the order of the Judge in the present circumstances cannot be entertained for a moment. Suppose that the Judge should decide that as to every witness who is called here. Then each of them stands as a suspected party; the Coroner could not examine them. According to that the Judge could shut out any investigation upon the matter.'

"*Mr. Clinton.* 'I have stated that under no circumstances will I argue this question with you. I shall say not one word about it.'

"*Coroner.* 'Then allow the Judge to continue, if you please, if you are not taking any active part here.'

"*Mr. Clinton.* 'I would not have spoken but that I was responding to the Judge.'

"*Judge.* 'It is all right, Mr. Clinton.'

"*Mr. Clinton.* 'Yes ; I merely want my position known.'

* * * * *

"*Coroner.* 'Well, gentlemen of the jury, finding that no answer will be made by Mr. Eckel, I shall proceed no further in the matter. The officer now will do his duty.'

"*Mr. Clinton.* 'That is, Mr. Coroner, to take him back ?'

"*Coroner.* 'Yes, exactly ; remand him back—not on any new committal, understand that ; we want no other *habeas corpus*.' The Coroner then asked the officers to bring down Mrs. Cunningham.

"In a few minutes they returned, accompanied by Mrs. Cunningham, who had Mr. Clinton's arm. Her demeanor was perfectly calm, collected, and cool. She exhibited no traces either of emotion or dismay. She went forward to the Coroner's table, handed him a paper, and returned to the witness chair, in which she took her seat.

"The Coroner read the paper which she handed to him. It was as follows :

"'My position in this case, for the purpose of this investigation now pending before the Coroner and his jury, was on Saturday judicially determined to be that of a defendant charged with the most horrible crime of murder, of which I am entirely innocent. I shall, therefore, by advice of my Counsel, decline answering all questions whatever. Whatever I may have to say will be reserved for another and more appropriate occasion.'

"The Coroner proceeded : 'It is unnecessary, gentlemen, to detain the investigation further, by going into any action such as we had a while ago. I repeat, it is quite unnecessary. I know my duty now.'

"Mrs. Cunningham left the chair, bowed her thanks to the Coroner, and retired in custody of the officer.

"*Coroner.* 'I will now take the responsibility on my shoulders of committing both one and the other to prison.'"

CHAPTER V

CUNNINGHAM-BURDELL MURDER CASE (CONTINUED)

Continuation of Evidence Before the Coroner's Inquest.—Startling Testimony.

THE daughters of Mrs. Cunningham, Augusta and Helen, and her sons, George D. and William S., the one nine and the other ten years of age, were examined at great length before the Coroner. The two daughters testified that on Friday night they and their mother, at the same time, retired between ten and eleven o'clock; that all three slept in one bed; that their mother slept in the middle of the bed, and did not get up until they all arose the next morning at the usual hour; that the reason the three slept together that night was that the younger daughter (Helen) was to leave the next morning, for Saratoga, to attend school. Although the daughters and their two little brothers were subjected to a severe and most searching examination—and their testimony was marked by great candor and intelligence—not a fact or circumstance was elicited which in any way militated against Mrs. Cunningham or Eckel. In view of the fact that each testified alone—separate and apart from all the others—the evidence was of great importance; for, if true, it went far to show, if it did not clearly prove, the innocence of Mrs. Cunningham and Eckel. Yet before the Coroner and his jury it had no effect.

During the inquest the following physicians testified as experts: Dr. B. Fordyce Barker, Dr. William H. Van Buren, Dr. R. O. Doremus, Dr. James R. Wood, Dr. George

F. Woodworth, Dr. William Knight, Dr. John W. S. Gourley, Dr. T. Childs, Dr. G. B. Garrish, and Dr. David Uhl.

After an immense amount of unimportant and irrelevant testimony had been given, a witness was called who gave testimony which was relevant and material, and of the highest importance, if true. This witness was John Farrell. He testified that, on the night of the murder, he left his house about half-past nine o'clock in the evening, walked down Marion Street, went up Prince Street to the Bowery, walked up the Bowery to Bond Street, came down the south side of Bond Street; he stepped on his shoe-string, and drew the string nearly out; he then stopped at 31 Bond Street, sat down on the stoop on the third or fourth step, took off his shoe, and tried to fix the string in its place. While there, two men came along; one passed the house; the other man, with a shawl on, came up the stoop and entered the house; as he entered, the witness heard his receding steps. Immediately afterwards, he thought in about half a minute, he heard the cry of "murder"; the cry sounded as if some one were choking. He testified that about a minute afterwards, while he was trying to fix his shoe-string, a man in his shirt-sleeves opened the door just enough to put his head out, and in a very rough manner said to him: "What are you doing there?" The witness said he saw the man's head, his shoulders, and a part of his left hand. He was sure the man had a beard, and that he had on no coat nor vest. The witness said that he was frightened, that he picked up his shoe, went down three or four doors, and put it on. After giving this evidence, the witness was taken to a room up-stairs, in which there were a large number of persons, including Eckel. After he came down, upon resuming his testimony, he said he recognized Eckel as the one who came to the door on the night of the murder. He said: "Probably I would have recognized him

if I had not seen him in twenty years again, because his countenance and the manner that I saw it, although he was higher than me, made such an impression that I would always remember it."

On the next day (the twelfth day of the inquest), James Scott testified that he had known the witness, Farrell, three or four years; that he was an honest man; that although he had known him to be under the influence of liquor two or three times during his acquaintance with him, he was generally a sober man. On the last day of the inquest the Coroner said to the jury: "I was called on yesterday frequently, by five or six gentlemen, stating that they could give a very excellent character of Farrell." None of these persons were produced as witnesses.

CHAPTER VI

CUNNINGHAM-BURDELL MURDER CASE (CONTINUED)

Continuation of Evidence on the Coroner's Inquest.—The Evidence Closed.—Peculiar and Extraordinary Charge of the Coroner to the Jury.—Labored Efforts of the Coroner to Show that Eckel and Mrs. Cunningham were Guilty.—Verdict of the Jury.

ON the eleventh day of the inquest Miss Brentford testified that she was engaged in business at 401 Broadway with the firm of Clyde & Black; that the firm kept for sale umbrellas, parasols, canes, etc.; that a gentleman and lady called to purchase a sword-cane, "on Friday a week ago," referring to the Friday on the night of which the murder occurred. The witness testified that she showed them some sword-canes; that the lady tried one against the table and bent it, and said it would not do. She stated that they said they "wanted one shorter, sharper, and stronger." The witness said she offered to get one made for them, such as they wanted. The witness stated that "they said it would not answer, that they *must have it that night*." The witness was taken to the room where Mrs. Cunningham was, and upon being asked if she could identify the woman who called to buy the sword-cane, said: "She looks very much like her, indeed." She stated that her size and proportions were the same, and her voice very much like the woman who called to make the purchase. The witness was taken to the Tombs to see Eckel. Afterwards, on resuming her evidence, she said he was not

the man who accompanied the woman on the occasion in question.

At this point in the proceedings, according to the report in the *New York Times*, the following incident occurred:

"At this point a gentleman came forward and said that he had gone with a lady to that store to buy a sword-cane. This would-be witness was a German, of unprepossessing features, who was introduced by Mr. Clinton for the purpose of giving very second-hand testimony. The Judge would not swear or examine him. He was intended by the Counsel to testify that a friend of his had told him that he was told of a lady who went with a gentleman to the store where this witness was employed, to buy a sword-cane. The Judge very properly said that if that lady were forthcoming, she should be confronted with the witness, Miss Brentford, and that he could not allow any second or third hand testimony to be taken in that inquisition.

"Mr. Clinton here commenced to interrupt, as usual, whereupon the Coroner said: 'This is not a Criminal Court. I won't have this interruption.'

"*Judge Capron* (to Mr. Clinton). 'The testimony of your witness cannot be introduced; it does not bear upon the case.'

"*Mr. Clinton*. 'It is just the same testimony that you have occupied ten days with.'

"*Coroner*. 'I will have no further interruption here. I wish to say that the first man who interrupts the proceedings of this Court, I will put him in prison.' [Applause from the spectators.] Mr. Clinton subsided, and presently left the room."

The person referred to as the "would-be witness" was Dr. J. B. Morton, of No. 119 Tenth Street. In a statement over his own signature, published in the *New York Times*, February 13, 1857, he said:

"The undersigned begs to state * * * in regard to the facts of the case, that he was present at the inquest quite by accident, and, so far from being introduced as a witness by Mr. Clinton, was totally unknown to that gentleman, and his possession of the information which would probably explain the evidence given by the female clerk of Messrs. Clyde & Black was, upon announcement, as new to Mr. Clinton as to any one in the room.

"The implication conveyed by the phrase 'the would-be witness' is totally incorrect. Upon statement to a bystander that I could explain the evidence given by the young lady, it was immediately communicated to Mr. Capron, and in response to his call I stepped forward to say that I could only give second-hand evidence, and that rather than seek to obtrude such testimony I would prefer making an effort to have the parties present themselves in person.

"If the sapient reporter is satisfied with this exposure of his blunders and misconceptions, enough; if not, he can have more.

"J. B. MORTON, No. 119 Tenth Street."

In commenting upon the statement of Dr. Morton, the *Times* said:

"To be serious, however, we are entirely satisfied from other sources that the doctor's intentions were misrepresented. We understand that a gentleman and lady of this city called at the store of Clyde & Black on the Friday of the murder, asked for a sword-cane, tried it, and held the same conversation in regard to it which is attributed by a witness to Eckel and Mrs. Cunningham. Dr. Morton was aware of this fact, and would have given the names of the parties, so that they might be summoned if the Coroner and Judge Capron had permitted. But, true to their purpose of *convicting* the suspected parties at all hazards, these gentlemen declined to listen to any such 'second-hand evidence'—while nine-tenths of all the evidence *against* them has been of the same indirect and second-hand char-

acter. It is claimed that Mrs. Cunningham has been identified as the lady who bought the sword-cane, and said it must be 'short and sharp,' and 'must be had that night.' This testimony is permitted to go through the length and breadth of the land, while proof which would completely explode it is ruled out and kept back day after day. This may be law, but it is not justice."

At the close of the proceedings on the eleventh day of the inquest, according to the report in the *New York Times* of February 11, 1857, the Coroner said to the jury:

"I would tell you previous to the announcement of the adjournment that I have received instructions—information, I should rather say—that Mrs. Emma A. Cunningham is insecure in her present position. Under these circumstances alone, together with important testimony which connects this defendant more or less with being the cause of the death of Harvey Burdell, I have therefore, gentlemen, sent her to the Tombs, to be imprisoned in the Tombs to-night, and kept there until the issue of this grand inquisition. [Applause, which was instantly suppressed.]"

The belief in the public mind of the guilt of Mrs. Cunningham and Eckel was sufficiently intense before the evidence of Farrell was given. This testimony seemed to remove all possible doubt of their guilt. Had Eckel been caught red-handed, in the very act of the murder, with Mrs. Cunningham aiding him, public opinion could scarcely have been more intense, fierce, and bitter against them. The following extract from an editorial in the *New York Times* of February 11, 1857, is a fair specimen of the tone of the Press at the time:

"THE CURTAIN LIFTED

"The Mystery of the Murder Dispelled.—The Bond Street Drama Approaches its Close.

"Yesterday's proceedings at the inquest substantially fastened upon John J. Eckel and Mrs. Cunningham the guilt

of the bloodiest and most awful murder that has startled this city for many years. * * *

"There seems little reason to doubt that Eckel did the deed—and he cannot be connected with it without implicating Mrs. Cunningham."

After stating the substance of Farrell's evidence, and the manner in which he identified Eckel as the one who came to the door in his shirt-sleeves and ordered him away, the editorial proceeds as follows:

"Thus the very precaution which Eckel took against being observed, his going to the front door and looking out to see if anybody was in the street, proved the means, and thus far the only means, of his exposure!

"The fact thus developed of his going to the front door explains the indications which led us originally to the belief that the murderer left the house after the deed was done—the appearance of blood upon the stairway wall and the casement of the outer door. It seems now almost certain that Eckel was secreted in the doctor's room when he entered, and that he dealt him the fatal blow almost immediately after he had come in and seated himself at his desk. The rapidity with which the whole was accomplished is shown by the statements of the witness Farrell, that not more than a minute and a half elapsed after the doctor's entrance before he heard the cry and then the fall, and that within half a minute after that Eckel came to the door. Mrs. Cunningham is also identified as having, in company with a gentleman, on Friday purchased a sword-cane in Broadway, describing the kind desired and saying they must have it on that day. This leaves it impossible to doubt her complicity in the murder, or that the whole affair *was deliberately and systematically planned*. * * *

"Eckel was probably in the front room when Burdell entered the back room, and on going in to deal the blow he would be very likely to leave the door between the rooms open. As one of the front windows was also open, a noise

might very easily be heard in the street without being very audible in other parts of the house.

"Eckel had probably taken off his coat and boots and fully prepared himself for the bloody deed. He must also have left the house that night to dispose of the weapon he had used, his bloody clothes and other mute witnesses of the murder—for these could not have been burned or put out of the way within the house. What disposition he has made of them will probably come to light hereafter. In spite of the horror that the fastening of such a crime upon a woman must inspire, the public mind will experience a feeling of relief at the discovery of the guilty parties. The prospect that the deed would remain shrouded in darkness, and its perpetrators enjoy complete immunity, induced a feeling of alarm and discontent. The disclosure of the mystery will bring a corresponding sentiment of satisfaction."

Mrs. Margaret Alviset testified that two or three days before the murder a young man came in her store, 599 Broadway, and bought a dagger-knife. She identified Snodgrass as the one who made the purchase. Agnes Smith, a saleswoman in the store of Mrs. Alviset, said that she was present at the time of the sale of the dirk-knife, and that Snodgrass looked like the one who made the purchase, but she did not positively identify him.

Just before these witnesses were called Snodgrass testified as follows :

Coroner. "You have been sworn before, and you are still under the same obligation as regards your testimony. Did you ever, recently, or at any time, go out in company with Mrs. Cunningham to buy a dirk, dagger, or sword-cane?"

Witness (promptly and emphatically). "No, sir."

Q. "Did you recently or at any time buy a dagger or dirk yourself?"

A. (emphatically, as before). "No, sir."

The Coroner at once ordered that Snodgrass be taken into custody. The proceedings upon the inquest before the Coroner (having occupied thirteen days) not long afterwards were brought to a close. The Coroner had been severely censured by a large portion of the Press for the course pursued by him during the inquest. In his charge to the jury upon this subject he said :

“The attacks on *myself personally, past and to come*, have, as to the former, failed in their object—they have not annoyed me or irritated me, as they were intended to; *they have been but as ‘dew-drops on the lion’s mane,’ dissipated by a single shake*, and their existence scarcely felt; and all other attacks on me will fall equally harmless.”

The positive testimony of Mrs. Cunningham and her daughter Augusta in respect to the marriage of the former to Dr. Burdell on the 28th of October, 1856, was, in the mind of the Coroner, entitled to but little weight. In his charge to the jury the Coroner said :

“That Eckel, Snodgrass, and Mrs. Cunningham possessed the *means and opportunity* of perpetrating the crime admits of no doubt. Whether they, or any two or one of them, *did* perpetrate it, is another question. But upon the second point—had the parties possessing the means and opportunities any motive for committing the bloody deed?—demands your serious attention. It appears that on the 28th of October last Mrs. Cunningham and Dr. Burdell, *or some one personating Dr. Burdell*, were married by Rev. Mr. Marvin—of the fact of a marriage having been solemnized, and that *Mrs. Cunningham was married to some one, there can be no doubt*; but was the person to whom she was married Dr. Burdell or some one else? The testimony of Miss Augusta Cunningham, if you believe it, proves that Dr. Burdell was the person married to her mother; but you will look and see whether her testimony is to be relied on, when it appears to my mind to be contradicted by *all* the attend-

ant circumstances. Dr. Burdell never acknowledged his marriage with Mrs. Cunningham, but, on the contrary, spoke of her in terms which would lead to the inference that no marriage between him and Mrs. Cunningham had ever taken place. The conduct of Mrs. Cunningham, who, it appears, had every motive for making the marriage known, was consistent with that of Dr. Burdell. Do you believe that if a marriage with Dr. Burdell had taken place, he would have allowed his wife to have her sleeping apartment in a room adjoining to, and communicating with, *the bedroom of Eckel*—that he would speak of her as a mere tenant and occupant of his house, of whom he was determined to get rid on the 1st of May—that he would uniformly take his meals out of the house, and conduct himself *after* the 28th of October exactly as he had done *before* that date. On this part of the case I beg your particular attention to the evidence of Mr. Chatfield and Mr. Thayer, for their testimony tends to show that about a month after the supposed marriage of Dr. Burdell with Mrs. Cunningham we find the latter making use of expressions that could not have been consistent with truth, and would not have been used by her had she become the wife of Dr. Burdell at the date indicated by the marriage certificate. The question whether Dr. Burdell was or was not married to Mrs. Cunningham has a most important bearing on the case, because if you shall come to the conclusion that the marriage of Mrs. Cunningham was with Eckel, taking for that purpose the name of, and impersonating Dr. Burdell, a very strong motive is shown *both in Eckel and Mrs. Cunningham* for putting Dr. Burdell out of the way. As the widow of Dr. Burdell, she would on his decease become entitled to considerable property, and she thus had a pecuniary interest in his death; and if the marriage was with Eckel, personating Dr. Burdell, it shows him to have been a party to the fraud, necessarily looking forward to the benefits accruing *to him* therefrom in a pecuniary point of view as the *de facto* husband of Mrs. Cunningham. Supposing this fraud to have been perpetrated, it is difficult to see in what way the par-

ties could be benefited by it, *except* by Dr. Burdell's death. Is it consistent with probability that the parties concocted the fraud (if, in point of fact, it *was* concocted) without any ulterior object or expectation of benefit from it—without at the time it was resolved on having in their minds some definite plan of action *to reap the fruits of it*? It is contrary to all our experience that a man will commit a fraud without a motive, and, conversely, that if he has committed such a fraud, he had a motive for doing it. So, again, if two parties join in committing a fraud, the natural inference is that each of them was a party in carrying it out to consummation; and, therefore, if you should be of opinion that the marriage of Mrs. Cunningham was *de facto* with Eckel, and *not* with Dr. Burdell, and if the evidence satisfies you that Eckel was a party whose hands were imbrued in the blood of his victim, I don't see how you can come to any other conclusion than that Mrs. Cunningham *must* have been, and *was*, a party privy to, and counselling, aiding, and abetting Eckel in the commission of the murder."

In regard to the testimony of Farrell, the Coroner charged the jury as follows:

"There is, however, the evidence of *one witness* of such vast importance that I feel I ought to make a few observations upon it. I mean the testimony of John Farrell, which was taken on the 10th instant. Gentlemen, it is, as you are aware, the peculiar province of a jury to decide on the degree of weight that they think fit to give to the testimony of each and every witness testifying before them. They have the advantage (not possessed by those outside the Court) of seeing the manner and demeanor of the witness, his willingness or unwillingness to testify, and before any weight can be attached to the evidence of a witness the jury must be satisfied that he is the witness of truth, and comes forward to speak of facts of which he is cognizant, and not to relate a tale the product of his own invention.

"The impression made on *my* mind at the time was, and

still remains, that the witness whose name I have mentioned was the witness of truth ; that he came before us and testified to facts and occurrences within his own knowledge ; and, if the same impression was made on *your* minds, then the next question which you will ask yourselves is this : Could the witness have been mistaken ? Had he the means and opportunity of seeing that the person who came down in his shirt-sleeves a few minutes after the person who we have reason to presume was Dr. Burdell entered the house, was Eckel ? If you believe that the witness in question was the witness of truth, and was not mistaken in his identification of Eckel, we have these facts established : That, within two minutes after Dr. Burdell entered the house, a cry was uttered within it as of a person being injured ; that such cry was sufficiently loud to be heard outside the house ; that, in another minute or so, all was silence ; and Eckel then appears at the front door, and there, on the side-post of that door, stamps with his left hand, wet with the blood of his victim, proof of his guilt. For what purpose he came to the front door we cannot positively say ; but it may be inferred, and I think the inference is a natural one, finding that his victim was despatched, and having a murderer's fears that the cries may have been heard by some person outside, he ventured to the door to satisfy himself that they had not been heard, thereby furnishing the strongest possible circumstantial evidence against himself that he was the murderer or one of the murderers (if more than one were engaged) in this horrid tragedy. Thus, gentlemen, by what *man* terms *accident*, but which may more fitly be termed the just and wise interposition of that Being who guides and governs all, and from whom no secrets are hidden, was the witness *Farrell* on the very spot at the *needed moment*, and was there made by the murderer himself a witness of his guilt. The evidence of Farrell clears up another difficulty which was presented at an early period of our inquiry. You will recollect that it was proved that there was blood on the staircase and passage of the first floor, showing that the murderer came down-stairs, and these appearances of blood suggested the

thought that the murderer left the house, and, if so, that no inmate of the house was implicated. The appearance of Eckel at the front door at once removes the difficulty, and furnishes corroborative proof of the truth of the hypothesis that the murder was not the work of any one who was concealed in the house or who entered after Dr. Burdell. Gentlemen, you will recollect the course I took to test this witness's accuracy, for of his veracity I had no doubt. I had Eckel sent for and placed promiscuously among about thirty other persons, and without the witness knowing that Eckel was in the room. I desired him to look around and see if he could point out the man who came to the door when he was on the steps; and from the thirty persons he picked out Eckel as the man, and he was not aware that the person he had so selected was Eckel until informed by me on his return to this room. If you can place full reliance upon the testimony of Farrell, and are satisfied that he has been under no mistake in his identification of Eckel, then the presumptions of his guilt for your consideration are threefold, as stated in a former part of my address.

“First. Had he the means and opportunity of perpetrating the crime?

“Second. Had he a motive to commit it?

“And, third. Did he use means and precautions to avoid suspicion or inquiry?

“If you answer these questions in the affirmative, then, gentlemen, the case as against Eckel is one of perilous, crushing weight. The evidence of Farrell has also a bearing on the case as against the other inmates of the house, for if the cries spoken of by Farrell were such as to be heard by him outside the house, can you conceive it to be within the range of probability that the ascending sounds did not reach the ears of those in the rooms immediately above? Gentlemen, I wish you to understand the law as applicable to this branch of the case. If Snodgrass, Mrs. Cunningham, and her daughters heard the cries of the murdered man, and had reason to know that a murder had been committed, or was in the course of perpetration, they would not be an-

swerable as accessories before the fact, and therefore, as such, amenable to justice equally with the party whose hand wielded the fatal instrument of destruction, unless they were before cognizant that the crime was about to be committed—had, as the law terms it, counselled, aided, or abetted the party or parties actually committing the murder.”

The Coroner's Jury rendered the following verdict :

“THE VERDICT

“*State of New York, City and County of New York, ss.:*
An inquisition taken at the house of the late Dr. Harvey Burdell, No. 31 Bond Street, in the Fifteenth Ward of the City of New York, in the County of New York, this 14th day of February, in the year of our Lord one thousand eight hundred and fifty-seven, before Edward D. Connery, of the City and County aforesaid, on view of the body of the said Harvey Burdell, lying dead at No. 31 Bond Street aforesaid, upon the oaths and affirmations of twelve good and lawful men of the State of New York, duly chosen and sworn or affirmed and charged to inquire on behalf of said people how and in what manner the said Harvey Burdell came to his death, do, upon their oaths and affirmations, say that the said Harvey Burdell, on the 30th day of January, 1857, at No. 31 Bond Street aforesaid, was feloniously murdered, and came to his death by being stabbed in various parts of his body with a dagger or other sharp instrument ; and the jurors believe from the evidence, and therefore find, that Emma Augusta Cunningham and John J. Eckel were principals in the commission of said murder ; and the jurors aforesaid further find that George Vail Snodgrass either joined the said Emma Augusta Cunningham and John J. Eckel in the commission of the said murder, or was an accessory thereto before the fact, counselling, aiding, or abetting the said Emma Augusta Cunningham and John J. Eckel to commit the said murder ; and the jurors aforesaid further find that Augusta Cunningham and Helen Cunningham, daughters of the said Emma Augusta Cunning-

ham, being in the house, No. 31 Bond Street aforesaid, where the said murder was committed, have some knowledge of the facts connected with the said murder, which they have concealed from the jury, and that it is the duty of the Coroner to hold them for the future action of the Grand Jury. In witness whereof, we, the said jurors, as well as the Coroner, have to this inquisition set our hands and seals on the day and place aforesaid.

Jurors :

“ F. H. Amidon, No. 60 Troy Street.

“ Charles A. Moore, No. 13 Harrison Street.

“ W. Schaus, No. 23 West Forty-first Street.

“ D. Beaudin, No. 171 Greene Street.

“ J. S. Fountain, No. 82 West Twenty-ninth Street.

“ J. A. Hawkins, No. 160 Greene Street.

“ George Clasback, No. 106 West Twentieth Street.

“ Lewis Lefferts, No. 105 Wooster Street.

“ Daniel F. Seacord, No. 67 Bleecker Street.

“ F. C. Brandt, No. 103 Macdougall Street.

“ James H. Orr, No. 46 Hester Street.

“ Richard Brown, No. 89 Clinton Place.

“ EDWARD DOWNES CONNERY, ss.”

The New York *Daily Times* of February 16, 1857, after stating the above verdict, continues its report of the proceedings as follows :

“ The verdict was received with obvious satisfaction by the audience.

“ *The Coroner.* ‘ Officer (to Captain Dilkes), I would here say that, in consequence of the latter portion of that verdict, the two girls are placed in my hands for the future action of the Grand Jury. There are two little boys upstairs, and there is nobody probably to mind them, and I wish you, sir, if you please, to place a guard here, so that no Counsel nor any one else may have any communication with them, until the District Attorney makes such arrangements as he may think proper with them on Monday.

There is another thing, gentlemen of the jury, that I would ask you. Hannah, the cook, and Mary—what disposition shall I make of them? Shall they be let out?

"A Juror. 'It appears to me that if they are let out they ought to give good bail to appear when called on.'

"Coroner. 'And would you advise me to keep Farrell as the principal witness? How would you advise me to keep him?'

"A Juror. 'I should think he is a very important witness, and he ought to be kept safe.'

"Another Juror. 'We want him well kept.'

"Captain Dilkes. 'I would state to the jury that Mr. Farrell's family are in very destitute circumstances. His wife has nothing to maintain herself with, and he has had nothing except what he has received in the way of food I have given him from the hotel. We had a regular subscription yesterday at the station-house for the support of his wife.'

"Coroner. 'Oh, I think the city would act in a matter of this kind. The city ought to do it.'

"Captain Dilkes. 'While the city are thinking of it the woman would starve.'

"A Juror. 'I suggest that the jury make a suggestion to that effect to the city—that is, that it take care of his family during the time he is in custody.'

'Several jurors stated that that proposal met their approval. The jurors were then discharged.

'Mr. E. Robinson, Jr., made a collection for the benefit of Farrell's family, to which the jurors and others contributed. It amounted in all to five dollars and fifty cents, and was handed over to Captain Dilkes, to be given to Mrs. Farrell.

'After the jurors and audience had retired, the Coroner made over the possession of the house and its effects to the Public Administrator, who had been previously authorized by the Surrogate to seize and hold the estate and effects, personal and real, of Dr. Burdell.

'And thus terminated what the Coroner called, not inaptly, 'this grand inquisition.'"

CHAPTER VII

CUNNINGHAM-BURDELL CASE (CONTINUED)

Public Opinion Strong and Bitter against Mrs. Cunningham and Eckel.—Mr. Clinton's Plan for Turning Public Opinion in Their Favor.—Proceedings before the Surrogate.

FROM the manner in which the Coroner conducted the inquest, from the intense excitement throughout the city, and the almost universal prejudice and bitterness of feeling against Mrs. Cunningham and Eckel, Mr. Clinton assumed from the start that the verdict of the Coroner's Jury would be against them. For reasons which he thought of great weight, bearing upon the interests of his clients, he did not regret the result. He foresaw that ultimately they—or, at any rate, Mrs. Cunningham—must be indicted and tried for the murder, although he had no doubt that she and all the inmates of the house, 31 Bond Street, were entirely innocent. The inquest was conducted so as to afford the real murderer every facility for escaping detection. The publicity and notoriety of the proceedings had probably destroyed all chances of ever detecting the real assassin. The only way to ferret out the actual perpetrator of the murder was for those who acted as detectives to proceed secretly; but everything done under the auspices of the Coroner was in the fierce blaze of publicity. Every step taken could not but have been known to the one really guilty. It could hardly be said that any effort had been made to ascertain *who* committed the murder; there was merely an unbroken series of efforts to

show that Mrs. Cunningham and Eckel were guilty. Mr. Clinton was so entirely sure that his clients were wholly innocent that, in the very early stages of the inquest, in an interview with the Chief of Police (George W. Matsel), he told him that if he would furnish detectives, and order them to act under his (Mr. Clinton's) direction, he would set on foot a thorough investigation, which, he believed, would result in the discovery of the real murderer. Mr. Matsel stated that he would be very glad to comply with Mr. Clinton's request; but if he did so, as a matter of courtesy, inasmuch as the Coroner had the same matter in charge, he would have to inform him, and report to him from time to time what progress was made. Mr. Clinton told Mr. Matsel that on such conditions he would not ask for any of his detectives.

Mr. Clinton thought that the sooner Mrs. Cunningham was indicted and tried the better would be her chances for acquittal. When the verdict of the Coroner's Jury was rendered against her and Eckel, not only that jury, but almost universal public opinion, had convicted them.

The New York *Daily Times*, which was remarkably temperate and fair in its comments, in its issue of February 16, 1857, in an editorial upon "The End of the Inquisition," said:

"This result, which has been steadily aimed at from the first by the persons engaged in conducting the inquest, will surprise nobody. It is indeed to be admitted that the general impressions of the public at large had anticipated this verdict, and that Mrs. Cunningham and Mr. Eckel, at least, were *morally* tried, convicted, sentenced, and hanged in half the drawing-rooms of this city more than a week ago. On the question of the complicity of young Snodgrass, the opinions of the community have been more divided; but the revelations made during the last two days of the inquest,

and particularly on Saturday, have gone far towards implicating him also in the condemnation passed upon his acquaintances."

The New York *Tribune*, in its issue of February 15, 1857, said :

"The generally received theory of the murder is, that Mrs. Cunningham had established herself at Dr. Burdell's house, hoping to entrap him into a marriage. Finding herself defeated in this object, she induced her paramour, Eckel, to personate Burdell in a sham marriage, either with the view of claiming her dower, a sum between thirty and forty thousand dollars, as Burdell's widow, in case of his natural death, or with her paramour assassinating him with that express object; and that the fact that Burdell, on the day preceding the night of his murder, had made a lease of his house, by the signing of which, at the time appointed on the next day, he would, on the 1st of May next, have dispossessed her and her family, and thrown them on the world, hastened the catastrophe, and caused it to occur on the night in question. That the murder was perpetrated by them the instant Dr. Burdell entered his rooms; that they had not anticipated any outcry, and that the single and half-stifled utterance of the word murder alone revealed the deed at the time, the victim being nearly instantly despatched with fifteen wounds, almost any one of which was, by the physicians, deemed fatal. That the bloody clothes of the murderers were then burned, which accounts for the smell of burning woollen perceived by so many witnesses in Bond Street on the night, between eleven and two o'clock, and that the instrument or instruments with which the deed was committed were, during the night, taken away from the house and secreted by one of the murderers, after all evidence of the bloody deed had been removed from his person."

The above are fair specimens of the tone of the Press in respect to the guilt of the parties implicated by the

verdict of the Coroner's Jury. Public opinion as to the guilt of Mrs. Cunningham and Eckel was of no ordinary character. The public had a fixed and decided opinion, to remove which would require not only evidence, but the strongest and most reliable kind of evidence. Public opinion was based upon deep thought and earnest attention to the case. Every fact or circumstance relating to the subject, whether strong or weak, direct or remote, was instantly devoured by the public. The voracity of its appetite for news—even if infinitesimally small—relating to the case, was such as was never exhibited in regard to any other subject in the memory of the “oldest inhabitant.”

The following statements from the leading daily newspapers will give but a faint idea of the extent to which the case absorbed public attention. The *New York Daily Times* of February 7, 1857, said :

“Though a full week has elapsed since Dr. Harvey Burdell was found dead on the floor of his office, the excitement that the shocking circumstance of the murder created has scarcely abated a whit. Who killed him, why, and how, are still as closely shrouded in mystery as when Dr. Francis first announced that the body showed signs of having been strangled, and that there were fifteen stabs in it, any one of which was sufficient to cause death. It still remains the all-absorbing topic of conversation; if other things are touched on it is only incidentally, and conversation drifts back to the strange murder, as if it held all ears, all tongues, with a horrid spell. The weather, the streets, which under ordinary circumstances would be the first subject in all out-door people's thoughts, are scarcely mentioned. In the cars, the ferry-boats, the hotels, bar-rooms, saloons—in all public places, and, so far as we can hear, in all private retreats—it is the subject of discussion, surmise, reverie. We have never known an excitement so universal, so intense, and so long unflagging in New York.”

The New York *Herald*, in speaking of the extent to which the case monopolized public attention, in its issue of February 12, 1857, said :

“Several important matters, which, under ordinary circumstances, would have excited universal remark, are passed over in silence. Among these is the examination of the alleged filibusters, the Stafford seduction case, the great freshet, the Scott and Davis correspondence. But all these matters are overlooked to discuss the question, ‘Who killed Dr. Burdell?’ The most trifling circumstances connected with the affair are snapped up with the greatest avidity. Over one hundred columns of evidence and comments have been given in this journal, and the public devours all that and cries loudly for more.

“The excitement permeates through every grade of society, from the highest to the lowest. The murder in Bond Street is the sole topic of conversation in the street, the omnibus, the saloon, at the theatre ; eating, drinking, walking, riding—nothing but Bond Street. The public sups on horrors, dreams of murders, and gets up the next morning with a renewed appetite for the same food. For the time being the murder absorbs every other topic, and the subject seems altogether inexhaustible.”

According to this article, the *Herald*, for the past eleven days, had devoted on an average not less than eight columns per day to this case. Its statement that “the public devours all that and cries loudly for more” was true to the letter.

The New York *Tribune* of February 15, 1857, said :

“An inquest of such duration as this is almost without precedent, as regards not simply the time occupied, but the amount of testimony produced, and the quantity, too, of immaterial testimony. We believe that not less than one hundred and fifty columns of the *Tribune* have been devoted to the evidence and comments thereon—an amount of space

which could not have been occupied by any other matter so satisfactorily to our readers. In fact, for the past fortnight this mysterious murder has preoccupied the public mind to the exclusion of almost every other topic. We are especially reminded of this fact by noticing the careless manner in which the news of the disastrous freshets around us—involving the destruction of property to the amount of millions of dollars—has been received in this city; the public heart being so interpenetrated with the sombre ferocity of the murder that it had no room for the entertainment of any other calamity. But a few months since the inundations in France—not, perhaps, exceeding the terrors of our own—called forth abundant notice and sympathy in this city; but now, with such a calamity at our own doors, almost, we are so murder-magnetized that, for the present at least, the wintry deluge is overlooked.

“The mystery of a secret and individual murder has at all times a fascinating interest not pertaining to open multitudinous wrath on flood or field.”

The *Tribune*, according to this statement, had, from the discovery of the murder up to that time, devoted daily on an average some nine or ten columns to the case. During the same period probably every newspaper, in every city, village, and town throughout the United States, devoted the greater part of the reading space in its columns to the Cunningham-Burdell murder case. Many of these newspapers doubled—and not a few trebled—their circulation by their reports, statements, and comments on the case. The case was almost as conspicuous in the newspapers in England and throughout Europe. Public opinion formed under such circumstances was not easily to be shaken.

Mr. Clinton saw at once that unless he could devise some way to roll back this tide of public opinion against his clients they were lost; their conviction of murder would follow almost as a matter of course. Although

every one will concede that public opinion ought not in any way to influence the verdicts of juries, who are sworn to decide upon the evidence, yet all who are familiar with criminal trials know that such verdicts are, to a large extent, the direct and inevitable result of public opinion. In the case of Mrs. Cunningham, had public opinion continued against her as it existed at the time of the inquest, and especially when the verdict of murder was rendered against her and Eckel, the chances would have been almost fifty to one that she would have been convicted and hanged. How to avert this fearful danger and turn the tide of public opinion in her favor was the important problem for Mr. Clinton to solve. It was necessary that the community should be shown by substantial evidence that the conclusions arrived at, hostile to Mrs. Cunningham, were wrong. The main hostility to her was based upon the idea that she was guilty of having induced some one to personate Burdell in the marriage ceremony performed by the Rev. Mr. Marvine on the 28th of October, 1856—such hostility to her was intensified by the belief that the man who personated Dr. Burdell on that occasion was none other than John J. Eckel. If it could be satisfactorily shown that it was Dr. Burdell whom she married, that the certificate of marriage, in its statements, was unqualifiedly, absolutely true, in letter and spirit, public opinion would leap to the opposite conclusion—that she was entirely innocent. This result Mr. Clinton determined to accomplish before her trial should come on. For this purpose, while the inquest was pending, and she was in custody—virtually, if not in form—charged with the murder of Dr. Burdell, Mr. Clinton went before the Surrogate and demanded that she, as his lawful widow, should administer upon his estate. So far as her pecuniary interests were concerned, it was not important, nor was it desirable, that she should act as administratrix. If she were the lawful

widow of Burdell, and some one else was appointed administrator, upon his final accounting, she could receive her share of the property. There was not much personal property—as it turned out—not enough to pay the expenses of litigation. As most of Dr. Burdell's property consisted of real estate, she could, after her trial for murder was over, have enforced her rights, and thus secured whatever belonged to her as widow. The sole object of Mr. Clinton in asserting her right to administer was to get before the public reliable evidence of the genuineness of the marriage, and thus remove the foundation on which rested the almost universal belief of her guilt. In this way Mr. Clinton believed that he could stem the torrent of prejudice against her and turn public opinion in her favor.

After the verdict of the Coroner's Jury was rendered, the interest in regard to the case, in the public mind, became, if possible, still more intensified. It seemed as though little else was talked about or appeared in the columns of the newspapers. The excitement in respect to the case appeared to increase every day. The lawyers who appeared for the heirs and next of kin in the proceedings before the Surrogate took the course Mr. Clinton specially desired them to take. They denied that Mrs. Cunningham was the widow of the decedent, Dr. Burdell, and alleged that she was never married to him. Thus an issue of fact was raised, which had to be tried preliminarily by the Surrogate before he could grant letters of administration to any one. Mr. Clinton's client had the affirmative of the issue, and, therefore, he was entitled to produce his testimony first. Nothing could exceed the eagerness of the public to have this preliminary trial begin without delay. The proceedings before the Surrogate, A. W. Bradford, were commenced on the 3d of March, 1857. The following is an account of the beginning of that day's pro-

ceedings in the report in the *New York Tribune* of March 4, 1857:

"At length the question, who are entitled to the estate of the late Dr. Burdell, and what the extent of their claims upon the Public Administrator? has been introduced to the Surrogate's Court, where it will meet with that attention which its importance deserves.

"Yesterday morning at ten o'clock, A. W. Bradford, the Surrogate, after some informal conversation with several of the leading gentlemen representing the parties interested in this case, proceeded to business by asking for the names of Counsel who were present on both sides, and the parties they respectively represented, which were as follows:

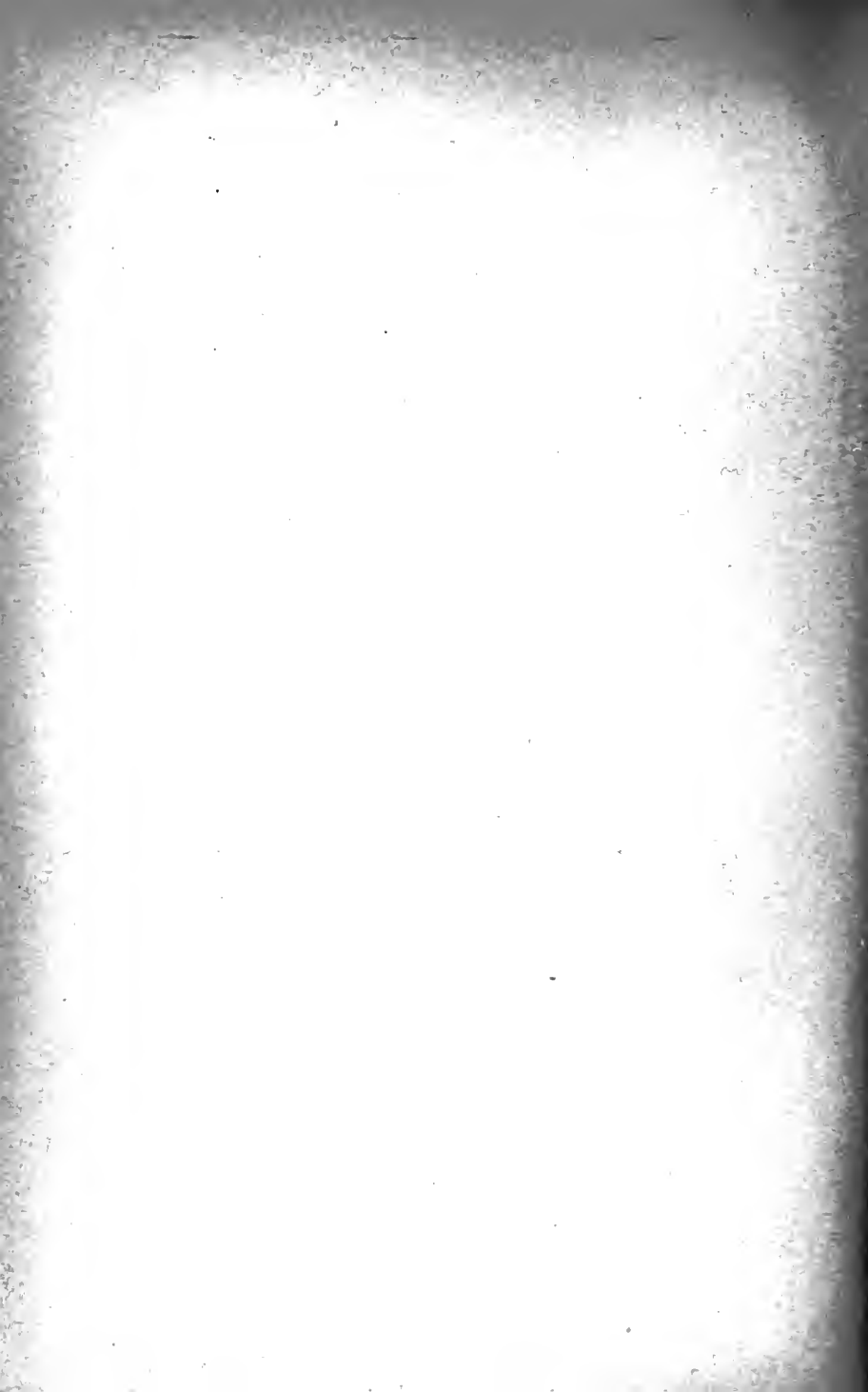
"Messrs. H. L. Clinton, B. C. Thayer, and William R. Stafford, for the widow of Dr. Harvey Burdell; Mr. Charles Edwards, for the children of John Burdell, deceased; Messrs. Tilden and Paterson, for William Burdell; Mr. Gardner, for Lewis Burdell; Mr. Tilden, for Mrs. Bulam, half-sister of deceased. At eleven o'clock the proceedings commenced.

"*Mr. Tilden.* 'What is the nature of your Honor's engagement for some time to come, and to what time will you probably adjourn? There are some points of view in which, in my judgment, it will be desirable not to enter upon this trial this morning. I am in daily expectation of testimony from the country, coming from quite a distance, which will be essential to enable me to cross-examine some of the principal witnesses who will probably be produced upon this day. It is very likely that no conflict of opinion or convenience will arise between us, because they may not propose to examine at the outset those particular witnesses. I make this inquiry, however, in order to know, as far as possible, how we stand. There is testimony expected from several places in the interior, each of them several hundred miles from the city. We have done the best we could to get it here by this time, but to-day it has not come, and I should feel unable to cross-examine some of the principal



HON. A. W. BRADFORD

Surrogate of the City and County of New York



witnesses upon the other side without the aid of the facts expected to be developed from those sources. I wish to consult your Honor's convenience and the convenience of the Counsel on the other side, so I state very frankly at the outset the exact condition in which the thing stands.'

"*Mr. Clinton.* 'I would prefer, in making a commencement, to go on, and I think the proceedings to-day will not conflict with his [Mr. Tilden's] wishes in that particular. If he has reference to the witness to whom I suppose he has, I have no objection to defer the examination.'

"*Mr. Tilden.* 'My remark applies in part to Miss Augusta Cunningham.'

"*Mr. Clinton.* 'Then I will not call her until a subsequent day.'

"*Mr. Tilden.* 'Whom do you propose to examine this morning?'

"*Mr. Clinton.* 'The first witness called will be the Rev. Mr. Marvine.'

"*Mr. Tilden.* 'How long does your Honor propose to sit?'

"*Surrogate.* 'As late as we can—until five o'clock, probably.'

"*Mr. Clinton.* 'I am disposed to oblige Mr. Tilden. I prefer making a commencement this morning, but if he makes a motion for an adjournment he will certainly meet with no objection from our side.'

"*Mr. Edwards.* 'I supposed, your Honor, that the usual hour for adjournment was three o'clock.'

"*Mr. Tilden.* 'I don't think I should be able to attend after three.'

"*Mr. Edwards.* 'I have one suggestion to make before Mr. Clinton opens. I know your Honor is supposed to know nothing of this case. I would suggest that, as it will turn out a remarkable one and of such a grave character, it will fairly require that two witnesses at a time should not be in the room. I am quite willing that that rule should be applied to my witnesses, and I ask that it be applied to all; and I would ask that Mr. Clinton in his opening shall make that opening in the absence of all witnesses. Your Honor

will very well understand how parties who are to give testimony can gather from the opening of the Counsel or from the statements of the Counsel what is important. I would ask, and I have no doubt that Mr. Clinton will consent, that witnesses should be out of the room.'

"*Mr. Clinton.* 'I am willing.'"

Mr. Clinton then made the following opening address:

"*May it please the Court:*

"It is a source of no small congratulation, both to my client and to myself, that we have at last arrived in a Court where we shall be protected in our rights, where the rules of law will be enforced, and where the rules of decency will not be outraged. I do not deem it necessary to make any extended opening in this case to your Honor. Should I attempt to answer the calumnies with which the community has been inundated in regard to my client, neither this day, nor this week, would be sufficient for that purpose. I shall therefore endeavor to confine myself strictly to the issue now raised in this Court, to wit: whether my client at the time of the death of Harvey Burdell was his lawful wife. That she was married to him on the 28th day of October last I think will be demonstrated not only to the satisfaction of your Honor and of the entire community, but to the satisfaction of my learned opponents. I believe that it will be proved so clearly that, after this proceeding shall have ended, they will give up all idea of maintaining, or attempting to maintain, that my client was not the lawful wife of Harvey Burdell. It is true, sir, that the marriage was to be kept secret, until a given time, from the world; and as far as any testimony yet has gone, I believe my client did keep the secret inviolate. Dr. Burdell, on the contrary, was not so entirely particular to maintain secrecy. On more than one occasion he admitted the fact to those in his confidence.

"First in the order of proof we shall introduce the clergy-

man who married these parties; and I think his testimony will forever settle that question. I am aware, sir, under what circumstances on a former occasion he was called with a view to testify whether or not on the day specified he did marry them. Rumors at that time were rife that a fraud had been practised upon him; that somebody had personated Dr. Burdell. He went to testify with his mind, to a certain extent, preoccupied with such rumors. It was represented that John J. Eckel was the man whom he married to Mrs. Cunningham on that occasion. Mr. Marvine was not allowed to see, or, at least, at that time did not see, Mr. Eckel. As I am told, he was given to understand that Eckel bore a strong resemblance to Dr. Burdell—such a remarkable resemblance that he might very readily be mistaken for him. Under these circumstances, Mr. Marvine was called as a witness. He was conducted into the room containing the corpse of Dr. Burdell. He was taken there by the Coroner, other parties being, I believe, excluded from the room. Dr. Burdell's corpse, whether for the purpose of deceiving, or for what purpose I will not now say, was dressed so as to make his appearance different from what it was when living. For example, it is well known to his acquaintances that he usually wore his collar turned over; yet the corpse was dressed with a very high stand-up collar, coming forward, so as in some respects to alter his appearance. The face of the corpse was somewhat bruised; the appearance, of course, was very much changed from that of the living person. Mr. Marvine saw the corpse. He was then asked whether that was the party whom he married on the 28th of October last. He did not then, not having seen Mr. Eckel, with his mind preoccupied with the impressions I have stated—he did not then give a positive opinion upon that subject; but, like a careful, conscientious, accurate man, as he is, he wished to reflect upon the matter—to reflect carefully, and, above all, before expressing a positive opinion, he desired to see the other person to whom I have alluded. He was asked whether the corpse that he had seen was the corpse of the person whom he had mar-

ried. He stated that there were strong points of resemblance; but as to whether it was that person or not he did not then express an opinion. Mrs. Burdell was subsequently brought into the room for identification, and at first he failed utterly to recognize her as the woman he married. He recognized the corpse much more strongly than he did the other party; but afterwards, on seeing her, and her daughter with her, one or both of them being dressed much as they were upon that occasion, he was satisfied that the one was the woman whom he married and that the other was the witness. He subsequently saw Mr. Eckel, and the moment he saw him he perceived that he did not bear the slightest resemblance, in countenance, figure, or in any way whatever, to the man he married. Mr. Marvine has reflected upon this matter, and weighed every circumstance connected with it; he has brought to his recollection the features of the man whom he married and the features of the corpse; he has given the subject that attention which he was bound to give as an honest man and a Christian; and he is now satisfied beyond a doubt, and has so testified, that the man whom he married and the corpse that he saw upon the occasion to which I have alluded were identical. I think, therefore, that the testimony of Mr. Marvine, when you come to hear it, will forever settle this question in regard to the marriage of Dr. Burdell and Mrs. Cunningham. In addition to that, sir, we shall present to you the testimony of the daughter, Miss Augusta Cunningham, who was present as the witness upon that occasion. I am aware that her testimony may be criticised, from the fact that she is the daughter of the party whose rights are now to be adjudicated. Yet, sir, I venture to say that when you shall have seen her upon the witness stand, when you shall have heard her testimony; when the Counsel on the other side shall have subjected her to as rigid a cross-examination as they may desire, that one and all will say that a more candid, truthful witness never appeared in a Court of justice.

“There are other witnesses whom we shall introduce with

a view to prove this state of facts. You have already, perhaps, heard unofficially of the testimony that will be given by Dr. Spicer ; I say you may have read it unofficially, because it has been published in the newspapers. Dr. Spicer received a letter from Dr. Burdell stating the fact of marriage under circumstances which he will detail upon the witness stand. Some have supposed that Dr. Spicer was too anxious to be a witness in this case. A man possessing the knowledge he has, who, upon hearing of the death of a person under such circumstances, and being aware that he had proof of a fact which was said not to be proved, but publicly disproved, if he did not come forward and make it known, I should say was an unsafe man to go at large in this community. It was a matter of conscience with Dr. Spicer, when he heard of the death of Dr. Burdell, to come to this city and make known the facts which rested in his knowledge. I invite my learned opponents, when he shall come upon the stand, to exercise their utmost skill, their greatest ingenuity, in cross-examining him. I am told, though I had no previous acquaintance with this gentleman, that he is a man of most excellent character, respected by those who know him, against whom there will not be a breath of slander, unless it may come from the relatives of Dr. Burdell, who may be stimulated to that course from the fact that he is an important witness in the case now pending before your Honor. As I said, the other side will have opportunity to criticise him—to sift him—and, if he be not a reliable witness, to prove it to your Honor. We throw down the gauntlet ; and I think if any attempt is made to impeach him we shall be prepared to sustain him by overwhelming testimony about which there can be no dispute or doubt. In addition to this, there are other parties to whom Dr. Burdell admitted the fact of his marriage. We are constantly getting additional information upon this subject. After all this testimony shall have been spread upon the record here, I think that the marriage of Dr. Burdell to Emma Augusta Cunningham, on the 28th of October last, will be proved as clearly and as strongly as any

marriage, kept secret by the parties, could, in the nature of things, ever be proved. And here I will take the liberty of stating how these parties came to be married by the Rev. Mr. Marvine. Mrs. Cunningham, while Dr. Snodgrass resided and preached in this city, was a member of his church, which she and her husband, with their family, constantly attended. It was quite natural therefore that, after he removed from this city to Goshen, she should prefer that her old pastor should officiate at the marriage ceremony. She went to Goshen for the purpose of engaging Dr. Snodgrass to officiate. It so happened that he was not at home; it was not in his power to comply with her wishes. She then, upon the recommendation of Mrs. Snodgrass, determined to apply to Mr. Marvine, between whom and Dr. Snodgrass friendly and somewhat intimate relations subsisted—they had been in the habit of exchanging pulpits. Upon the recommendation of Mrs. Snodgrass she caused Dr. Burdell to apply to Mr. Marvine; and it will strike your Honor that it would be most unnatural—most monstrous—to entertain for one moment the idea that if this lady intended to be a party to a fraudulent marriage, she would apply to her old pastor to perform the marriage ceremony. I am aware, sir, that many rumors, which I shall not stop to notice, have been set afloat in this community with a view to show that this lady never was married to Dr. Burdell; and I am aware of the manner in which public opinion has to a considerable extent been formed from the very peculiar, one-sided, *ex parte* prosecution set on foot against her by Coroner Connery. No one who was present at that investigation would wonder at any impression being formed from the manner in which it was conducted. I know that before your Honor the proceedings before the Coroner will have no influence whatsoever; and the community, when they shall come to understand how the rights of this lady were treated by that official, will have no confidence in the proceedings which took place; and they will be quite as ready to do justice to her, and change their impressions thus hastily formed, as they were

to form adverse impressions. It was sought to be shown, and perhaps will be here, that because this marriage was kept secret, and because Mrs. Burdell acted to the world as though she were not married, that that was proof that she actually was not married to Dr. Burdell. I submit to your Honor that so far from proving that, no matter what acts they may show based upon the idea that she was not married, it will rather go to show that she kept faith with Dr. Burdell when she promised to keep the marriage secret.

"There is one piece of testimony which has been very much misrepresented—unintentionally, no doubt—which was given there, and which may be sought to be introduced here, to which I will allude; and that is the testimony of one of my associates, Mr. Thayer. It has been stated that he testified that a month after this marriage took place this lady applied to him to recommence a certain suit which had been discontinued, that was brought on account of the doctor having failed to perform his promise of marriage with her. The facts are simply these: A suit for a breach of promise of marriage was commenced; it was discontinued in October. The parties themselves settled the suit. It was settled, as we understand, upon the express condition that within a certain number of days the marriage should take place; and I believe it did take place within that time. Subsequently Mrs. Burdell applied to Mr. Thayer for advice, and in the course of the interview put the hypothetical question: 'Suppose a lady is married, can she make an assignment of a judgment, or any assignment, using her former instead of her married name?' That was the object of Mrs. Cunningham's visit to Mr. Thayer; and he stated to her that the proper way was undoubtedly to use the married name; but if there was no doubt as to the identity of the party the assignment would undoubtedly be valid in law, although the former name was used. She at that time held a judgment against William Burdell, which Harvey Burdell had caused to be assigned to her, because he wished to prosecute it, and he did not desire to do it openly against his brother. Upon Mr. Thayer's giving this advice she im-

mediately transferred this judgment, which she held against William Burdell, to Dr. Harvey Burdell, using the name of Emma Augusta Cunningham. Mr. Thayer is uncertain whether it was when the suits were discontinued, or when she came about this assignment, that he asked her what had become of the breach-of-promise case. She had expressly agreed with Dr. Burdell not only to keep the marriage a secret from the world, but from Mr. Thayer in particular. Of course, if the question were put to her, she could say nothing less than to divert his suspicion from the fact that she was married, in the same way as she would that of any other person. This is the explanation. If my opponents see fit to call Mr. Thayer to state that, or for any purpose whatever, I have no doubt they will be at liberty to do so. I shall not occupy further time in opening this case to your Honor. I have endeavored to confine myself strictly to the record. There is, perhaps, one motion that I ought to make before going on with the testimony, and that is this: I see that among the objections filed by my opponents is one that this lady has another husband living. I deem it my duty to move that this objection be made more specific. If the objection is to remain upon the record, I think my opponents should be required to name the party to whom they allude. It is perhaps true that the merits of the case will come out on the first objection, which is to the effect that Dr. Burdell and this lady were never married. I shall therefore ask them to be more specific in regard to the second objection. There is only one more suggestion which I deem it my duty to make. This is undoubtedly the first time that a case was ever presented to your Honor where the party was accused of the grave and serious offence with which it is known to the whole community this party now stands charged. I consider it my duty to maintain her rights here, notwithstanding, as I believe, a wholly baseless and unjust accusation has been made against her in another Court. *With me, therefore, rests the sole responsibility of the proceedings pending before your Honor.* I have no doubt that we shall establish the marriage, and that

before we are through you will be satisfied not only that the marriage actually occurred, but that there is no legal nor moral obstacle in the way of granting letters of administration to this lady. I consider that to abandon her rights here, because a baseless and unjust accusation has been made in another quarter, would be cowardly and unprofessional on my part. I shall, therefore, maintain her rights before this Court; and I am satisfied that where rules of law and justice prevail, as they do here, her rights will be safe."

After the delivery of Mr. Clinton's address the following occurred:

Surrogate. "There has been one suggestion made in regard to the allegation that this lady has another husband."

Mr. Edwards. "I suppose that the chief question here is whether this woman is the widow of Harvey Burdell. That's got to be first made out. If I were to admit that she was his widow—which I cannot and do not believe in, even after the address of Mr. Clinton—from what I know, if I did admit that, then might come the question on my second point as to whether she is not the wife of another man. I would suggest to your Honor that I had some ground for putting that point in. I am anxious to keep that to myself until the proper moment. It may not be necessary to bring it out. It would be in case your Honor should decide that she is a widow. What I have gathered in regard to that has partly come from Mrs. Cunningham. I am reluctant to say anything more, and shall ask that my pleading shall stand as it does. If your Honor should insist on a more distinct avowal, I should rather have it stricken out than to make it."

Mr. Clinton. "I think it is due to your Honor that this Court should not be made the vehicle for irresponsible slanders to go forth to the public. If Mr. Edwards wishes this objection to remain, it certainly should be made more explicit. If, rather than disclose to what he alludes, he pre-

fers that the objection be stricken from the record, that course will have to be taken. I therefore move your Honor that this be stricken from the record."

Mr. Edwards. "Your Honor will perceive that the first issue is sufficient, and there is no necessity at this stage of this case to put this on paper at all. Suppose that your Honor should decide that Mrs. Cunningham was Mrs. Burdell, then any of us have a right to say that she has no right to administer in regard to this estate because she is a married woman, and as a married woman she could not take letters of administration. I conceive that if your Honor should strike it out I should have the advantage of it."

Surrogate. "The object of pleadings is to give notice to the respective parties of the matters which are to be tried, and all the pleadings ought to be completed before the Court proceeds to trial. I have no doubt, therefore, that the other side is entitled to a more specific allegation on that point. I will let this matter stand until the next hearing in this case, for their consideration; but at that period I shall call upon you to name the party or withdraw the allegation."

Mr. Edwards. "To save your Honor's time, I respectfully decline now to make the objection more specific."

CHAPTER VIII

CUNNINGHAM-BURDELL CASE (CONTINUED)

Evidence before the Surrogate as to whether Mrs. Cunningham was Married to Dr. Burdell on October 28, 1856.—Six Days before May 1, when the Trial for Murder was to Begin, Mr. Clinton Moves for a Postponement of the Case before the Surrogate.—The Surrogate's Decision.

THE first witness called was the Rev. Uriah Marvine. He testified to the performance of the marriage ceremony between Dr. Burdell and Mrs. Cunningham on October 28, 1856. He explained the circumstances of his failure at the Coroner's inquest to identify either of the parties to the marriage. In respect to the identity of the lady he married on that occasion, he testified as follows :

Mr. Clinton. "State whether or not you have since been able to recognize the person known as Mrs. Cunningham as the person you married."

A. "Some few days ago she sent for me to call upon her at the Tombs. I went, and, the first look at the woman, it flashed more upon my mind than ever that that was the woman I married ; or, in other words, she then resembled more the woman I married than she did when I saw her on that Sabbath."

Mr. Clinton. "Were you satisfied on that point as to whether she was the woman you married ?"

A. "I am."

Mr. Clinton. "Perfectly ?"

A. "Perfectly."

With regard to the identity of the man he testified as follows :

Mr. Clinton. "State whether since that occasion you have taken any pains to recall to your recollection the features of the man whom you married on the 28th of October last."

A. "Since the murder I have thought a great deal of it ; I have recalled the features and general appearance of the deceased, and compared them with the features and general appearance of the man I married, and the more I have done so the more I am convinced that the man I married was Harvey Burdell."

Mr. Clinton. "State, doctor, whether you have any doubt whatever that the corpse and the man whom you married on the 28th of October last were one and the same."

Mr. Edwards. "I object."

The Surrogate. "Ask him to state his best belief from comparison."

Mr. Clinton. "I will ask him thus : State whether the corpse of Dr. Burdell—"

Mr. Edwards (interrupting). "Your Honor will please consider that the last answer was taken subject to an objection."

Mr. Clinton. "If a clergyman could not give an opinion upon this point, I do not know who could."

Mr. Edwards. "We don't want opinions, but facts."

Mr. Clinton. "That is what we are trying to give."

Mr. Clinton. "State whether the corpse you saw on that Sunday at No. 31 Bond Street was that of the person you married on the 28th of October."

Mr. Edwards. "We object."

The Surrogate. "On what grounds?"

Mr. Edwards. "That is a conclusion which the Surrogate has got to draw from the testimony of the witness."

The Surrogate. "I shall allow the question." [Question repeated by Mr. Clinton.]

Witness. "Shall I answer?"

The Surrogate. "Yes, sir"

Witness. "I think it was."

Q. "Have you any doubt whatever on that subject?"

A. "None whatever."

The witness further testified as follows :

"I have seen several persons who have described Dr. Burdell, and who are well acquainted with him, and who have told me how he looks, acts, talks, etc. After they had finished my reply has uniformly been, 'You have described the man I married.' * * * Many persons have talked to me in reference to this, whose names I do not know."

This witness was subjected to a severe, thorough, exhaustive cross-examination by Samuel J. Tilden, who was (in a certain way) an eminent lawyer. He was afterwards Governor of the State of New York, and in 1876 was the candidate of the Democratic Party for the office of President of the United States. The direct testimony of Mr. Marvine was in no way shaken by his cross-examination. In speaking of his testimony before the Coroner, he said :

"I was under the general impression at that time, before I had seen the corpse, that I had married Mr. Eckel to Mrs. Cunningham—I had not then seen Eckel—that idea was preached into me as soon as I entered the dwelling (31 Bond Street) before I gave my testimony. * * * I got that impression and supposed the facts were so ; but my faith in that thing was mightily shaken when I went up and saw the dead body."

He testified that when afterwards he saw Eckel :

"I saw nothing in Mr. Eckel resembling the man I married—not a thing. * * * In my own mind I knew Mr. Eckel was not the man the moment I visited him."

On the re-direct examination the witness testified as follows :

Mr. Clinton. "Was there any resemblance between the appearance of Eckel and the man you married?"

A. "None whatever."

Mr. Clinton. "In voice, look, size, action, or in any other respect whatever?"

A. "No, sir ; none whatever."

The further hearing before the Surrogate was adjourned to the 12th of March, when the cross-examination of Mr. Marvine was continued by Mr. Tilden and Mr. Charles Edwards. In the course of his cross-examination, among other things he testified that when he was at Goshen the wife of the Rev. Dr. Snodgrass told him that she had some time before been a guest of Mrs. Cunningham at 31 Bond Street for three weeks ; that she saw nothing out of the way ; if she had she would not have remained there. When interrogated in respect to his testimony on the inquest, he said that from the outset he became enraged at the Coroner on account of the manner in which he conducted himself towards him. The witness testified as follows :

"He [the Coroner] took me into that room to see the dead body ; with his stentorian voice he wanted me to say 'Yes' or 'No' ; 'is that the man on that bed?' and began to tell me about the solemnity of an oath. * * * I think I had replied to him * * * that I ought to know as well as he did what an oath was, and the consequences of a false oath. * * * I think the man was a very weak-minded man, or a very foolish man—one or the other. * * * He assumed that loud, important, dictatorial way—just as if he was the Lord High Mayor of London—and it did not exactly suit me."

On the re-direct examination Mr. Marvine stated that in respect to the fact of Dr. Burdell being the man whom

he married to Mrs. Cunningham, his testimony before the Grand Jury was the same as that given before the Surrogate.

Sarah McManilen, a servant-girl in the employ of Rev. Mr. Marvine, testified that at the time of the marriage she was in the adjoining room, saw the parties, and observed the ceremony. She testified that at the inquest she saw the corpse of Dr. Burdell, and that she thought it looked very much like the man Mr. Marvine married on the 28th of October; but she declined to give a positive opinion on the subject. The further hearing before the Surrogate was adjourned to the 26th of March, at which time it was further adjourned to the 13th of April.

Helen Cunningham, the second daughter of Mrs. Cunningham, testified that before the 28th of October, 1856, Dr. Burdell, in the presence of herself, her sister Augusta, and her two young brothers, put a ring on the finger of her mother, and that she had worn that ring ever since. She also testified that she saw Dr. Burdell, her mother, and her sister Augusta leave the house on the evening of the 28th of October, 1856; that before they left her mother told her she desired her to be sure and remember the 28th of October, but gave no specific reason why she desired her to remember it. She stated that her mother told her that all difficulties between her and Dr. Burdell had been settled. The witness knew about the quarrel between them in September. One of the reasons why she remembered that night in particular was, it was the first time her mother had gone out with Dr. Burdell since the quarrel had occurred. She stated that after the 28th of October Dr. Burdell talked of going to Europe the next summer, and taking with him her mother and her sister Augusta. She said that after the 28th of October her mother talked with her to the same effect.

Augusta Cunningham, the eldest daughter of Mrs.

Cunningham, was the next witness. She testified that she was eighteen years of age; that on the Sunday morning preceding the marriage (which was Tuesday evening) Dr. Burdell, in the presence of her mother, asked her if she would be willing to witness the marriage between him and her mother. He told her that he desired her to keep it a secret until the following June, when he and her mother intended to go to Europe, and he would take her if she desired to accompany them. He asked her mother if she (the witness) could keep a secret; her mother replied he must ask her (the witness). She testified that in the same conversation Dr. Burdell said her mother was going to Goshen, to see if she could get Rev. Dr. Snodgrass to come to the city and marry them. The following is an extract from the report of the testimony of this witness in the New York *Daily Times* of April 14, 1857:

“I then asked him [Dr. Burdell] why he wished it kept a secret? He said that he had promised Dimis Hubbard.’

“Q. ‘Who?’

“Mr. Clinton. ‘Miss Hubbard, she is called. She was married, but has been divorced.’

“Witness. ‘He said he had promised he would never marry any one while she was single; that she was the only encumbrance he had on his hands at that time, and that she was to be married before June next; mother then told me I should not ask any more questions about it; I then left the room, leaving the two there together.’

“Q. ‘What was the next occasion when the subject was spoken of by Dr. Burdell?’

“A. ‘I spoke to mother about it when she came up-stairs; she said—’

“Mr. Edwards objected.

“Witness. ‘I asked if she wanted to have it kept secret—’

“Surrogate. ‘They object to anything she said unless the doctor was present.’

"*Witness.* 'Nothing further was said about it down-stairs.'

"*Q.* 'When did you next hear the doctor say anything on the subject?'

"*A.* 'Next morning the doctor told me that mother had gone to Goshen, for that purpose, to Dr. Snodgrass ; he told me that in his office ; no one was present but the doctor and myself ; I said nothing further to him, and that is all he said at that time on the subject.'

"*Q.* 'When was it next adverted to in his presence?'

"*A.* 'I don't think he spoke about it again till Tuesday morning.'

"*Q.* 'What did he say then?'

"*A.* 'He then asked mother what her age was.'

"*Q.* 'Did she tell him?'

"*A.* 'She did.'

"*Q.* 'What age did she give him?'

"*A.* 'She said thirty-five.'

"*Q.* 'Where was this?'

"*A.* 'In his office.'

"*Q.* 'Was any one else present at that time except you, your mother, and the doctor?'

"*A.* 'No, sir.'

"*Q.* 'State all else that was said at that time, when he asked your mother her age.'

"*A.* 'He had a paper with him that Mrs. Snodgrass had given mother, with Mr. Marvine's address on it ; he stated that he was going to the bank, and that he would see Mr. Marvine before he returned. I don't remember anything particular that was said after that.'

"*Q.* 'After Tuesday morning when next was the subject referred to?'

"*A.* 'I did not see him then till six o'clock in the evening ; I then saw him in the hall.'

"*Q.* 'What passed?'

"*A.* 'He merely made the remark, saying : "I have accomplished it" ; I don't remember the answer I gave him ; he then passed on up-stairs ; it was at the foot of the stairs this conversation took place ; I went down to tea.'

"Q. 'Was your mother at tea?'

"A. 'She was; she was not down at that time; she came down afterwards.'

"Q. 'Did the doctor take tea with you?'

"A. 'No.'

"Q. 'When did you first see him after tea?'

"A. 'After tea I went immediately up to his room.'

"Q. 'Did you find him there?'

"A. 'Yes, sir; he then told me to prepare myself to go.'

"Q. 'To go where?'

"A. 'With him and mother to Rev. Mr. Marvine's; I then left the room, for the purpose of doing so.'

"Q. 'You went up-stairs and dressed yourself?'

"A. 'Yes, sir.'

"Q. 'Where did you next see the doctor?'

"A. 'When I came down-stairs I saw him in his office; mother was there waiting for me.'

"Q. 'Where did you go from the office?'

"A. 'We went down-stairs.'

"Q. 'All together?'

"A. 'Yes.'

"Q. 'From the office, where?'

"A. 'We were going to pass out; my mother met my sister Helen in the hall, and told her that she wished her to remember this night; I don't know what answer she made mother; we then passed out.'

"Q. 'About what time was it when you left the house?'

"A. 'It was between seven and eight.'"

The witness stated that they went to the house of Rev. Mr. Marvine, No. 732 Greenwich Street; that on their way there her mother and Dr. Burdell discovered that they had not provided themselves with gloves. Dr. Burdell said he would purchase gloves for them both. The witness and her mother went to the place of Mrs. Salenbach, their corset-maker, which was opposite the Metropolitan Hotel, Dr. Burdell leaving them at the door. After he had purchased two pairs of white

gloves, he joined them at Mrs. Salenbach's place, gave one pair to her mother, and kept the other pair himself. They then went directly to Rev. Mr. Marvine's house. The following is an extract from her testimony as reported in the *New York Daily Times* of April 14, 1857:

"Q. 'Was there nobody in the room when you went in?'

"A. 'No, sir.'

"Q. 'Who first came into the room after you went in?'

"A. 'Mr. Marvine.'

"Q. 'Tell us all that happened there; if there was any conversation.'

"A. 'Mr. Marvine made the remark — "You see, I am punctual"; he then took my name and age on a piece of paper; he asked that from myself; mother then said I was her daughter.'

"Q. 'What next happened?'

"A. 'The doctor introduced mother and myself to Mr. Marvine; I think that was after he took my name, or before — I cannot say with certainty.'

"Q. 'What was the next thing?'

"A. 'I think he then performed the ceremony.'

"Q. 'Where did your mother and the doctor stand when the ceremony was performed?'

"Witness. 'Do you mean in regard to Mr. Marvine?'

"Q. 'Which side or end of the room did your mother and the doctor stand in when the ceremony was performed?'

"A. 'The doctor stood facing Mr. Marvine; my mother stood at his left; Mr. Marvine was in front.'

"Q. 'Did the bridal couple stand by the fireplace, or at the folding-door, or in the middle of the room, or where?'

"A. 'Mother stood in front of the sofa and the doctor stood kind of round from her, not in a straight line with her; he stood a little in front of her.'

"Q. 'The ceremony was then performed?'

"A. 'Yes, sir.'

"Q. 'What happened next immediately after the ceremony was performed?'

"A. 'Mr. Marvine made a short prayer ; after that he made some remarks, which I don't remember what they were ; Mr. Marvine then asked the doctor if he wished a certificate.'

"Q. 'What did the doctor say to that?'

"A. 'I think the doctor said it would be better to have one ; Mr. Marvine told him he would have it ready for him in the morning if he would call for it. The doctor said he would ; we then left the house.'

"Q. 'Did you see any domestics in the back room at that time?'

"A. 'No, sir.'

"Q. 'Did you see or hear any signs of any person being in the back room?'

"A. 'I thought there were some persons peeping through the folding-doors, looking through.'

"Q. 'Was there anything said at that time about keeping the marriage secret?'

"A. 'The doctor said at the house before we left that he did not wish Mr. Marvine to publish it.'

"Q. 'Did he mention the reason?'

"A. 'No, sir.'

"Q. 'What did Mr. Marvine say?'

"A. 'I don't remember what his answer was.'

"Q. 'Was it the doctor or your mother said that to Mr. Marvine?'

"A. 'The doctor.'

"Q. 'Not your mother?'

"A. 'No, sir.'

"Q. 'After you left the house where did you go?'

"A. 'We went immediately home.'

* * * * *

"Q. 'Was anything said on the way from Mr. Marvine's that you recollect?'

"A. 'I made the remark to the doctor that if I ever should tell it, what would he say? he said he would kill

me; I don't know whether he said it in earnest or in jest; mother asked him why he did not give Mr. Marvine the ring; he said he did not ask for it; he (the doctor) said if he would put it on her finger and say a few words it would do just as well.'

"Q. 'Is that all you recollect that was said on the way home? did he do anything at that time about the ring? did he put a ring on her finger?'"

"A. 'Yes, sir.'

"Q. 'In the street?'"

"A. 'Yes, sir.'

"Q. 'Where did he get the ring from?'"

"A. 'I don't know whether he had it in his hand or on his finger; I don't know where he took it from.'"

The witness testified that Dr. Burdell and her mother occupied the same sleeping-room that night; that they continued to do so until December, when her sister was taken ill, and her mother after that slept with her. On the Coroner's inquest an attempt was made to show that Dr. Burdell was in Saratoga on the 28th of October—the time of the marriage. The witness testified that after the marriage, and during the latter part of the week, he went to Saratoga.

The witness stated that on the 1st of May, 1856, Dr. Burdell and Dimis Hubbard commenced boarding with her mother at 31 Bond street, and continued to board with her until her mother refused to permit Dimis Hubbard to remain in the house any longer. The witness testified that Dr. Burdell and her mother, after the 28th of October, frequently spoke to her about the marriage. She said the doctor would ask her how she liked having a new father.

Quite early during the proceedings before the Surrogate, some confusion having arisen by reason of the fact that the Counsel of the widow of Dr. Burdell referred to her as "Mrs. Burdell," while the Counsel of the next

of kin of the deceased called her "Mrs. Cunningham," it was agreed that she should be called "the claimant." The Counsel for the claimant then called the witness, Dr. Daniel D. Smith, who, according to the report in the New York *Daily Times* of April 15, 1857, testified as follows:

"EVIDENCE OF DANIEL D. SMITH

"Dr. Smith, who is a resident of the house No. 35 Bond Street, and is by profession a physician and surgeon, stated in reply to Mr. Clinton that on the 30th of October last he saw Dr. Burdell at breakfast or dinner in the Lafarge House. Witness having a bad memory of numbers and dates, could not say positively whether it was at breakfast or dinner, but thought it was at breakfast. At first he failed to recognize the deceased, because his appearance had changed since witness had last seen him, which might have been about six months before. During that time Dr. Smith had been absent in Europe, and had just returned when he met Dr. Burdell at the Lafarge House. He made the voyage home in the steamship *City of Baltimore*, which had arrived at Philadelphia on the previous night (October 29), and he was conveyed by boat from the ship to the wharf in time to catch (as he believed) the five-o'clock train to New York. The change in Dr. Burdell's personal appearance consisted in his having a mustache and dark beard and whiskers, as if they had been dyed. When the witness was in the habit of meeting him previous to his departure for Europe the deceased had no mustache, and his beard and whiskers were of a grayish hue, or striated. Subsequently to this recognition, and before they left the hotel, witness and Dr. Burdell entered into a conversation which related to the European tour of the former. The deceased was very particular concerning it, and remarked that he thought some of going to Europe himself. Witness asked him when, and he replied that he thought he should go in the June ensuing. Witness asked why he did not go then (at the time of the conversation), and

stated that it was a pleasant season of the year, and if he intended to visit Italy it would be comfortable in the south, and he would be in season to see the carnival at Rome and Venice. The doctor assigned as his reason for not going at that time the pressure of business engagements. The witness then inquired of him if he intended to go alone, to which the doctor said no, that he should have ladies in his company, or that ladies should accompany him. Having heard the deceased speak rather sneeringly of marriage in times past, witness jokingly said to him: 'Doctor, are you going to be married?' The doctor made no reply, but laughed in a peculiar, significant way, which led the witness to think that it might possibly be the fact that he was going to be married. He then turned and went away; they met several times after that; Dr. Burdell invited the witness to call and see him, as he said he wanted to make some further inquiries respecting Europe, but witness deferred the visit from time to time, and, in fact, did not go at all. The times during which he saw him again were along about the time of the Allen trial, which (one of the Counsel said) commenced on the 10th of November, and was tried before Judge Nelson. The witness never saw the claimant here (Mrs. Cunningham) but once, and had no acquaintance with her before this transaction with which she was mixed up, and about which the community had been so much excited, occurred.

"On his cross-examination the witness stated that, at the time he had the conversation with Dr. Burdell in the Lafarge House, the doctor did not tell him that he was married, nor did he tell him in any of their subsequent conversations; the witness himself never referred to the subject again. The only time the witness ever saw Mrs. Cunningham was one Saturday, some time ago, when, in company with a lady who was very anxious to see the City Prison and Mrs. Cunningham, he obtained admission to the Tombs, and, after being refused permission to see Mrs. Cunningham, sent up his card, and was eventually allowed to visit her in her cell."

The evidence of this witness in respect to the appearance of Dr. Burdell's beard and whiskers on the 30th of October, 1856, was strong corroboration of the description given of his appearance at the marriage by Rev. Mr. Marvine. The statement of Dr. Burdell's purpose to go to Europe in June and take ladies with him was strong confirmation of the truth of the testimony of Helen and Augusta Cunningham with regard to his declarations on the subject. The next witness called for the claimant was Buckley T. Benton, who, according to the same report in the *New York Daily Times*, testified as follows:

“EVIDENCE OF MR. BENTON

“Mr. Buckley T. Benton, a gentleman employed in the gold-pen and jewelry trade, whose residence is No. 11 St. Felix Street, Brooklyn, and place of business in Gilsey Building, corner of Cortlandt Street and Broadway, was the last witness examined for the claimant. He testified that he had known Dr. Burdell for six or seven months prior to the doctor's murder. He, as well as the doctor, was a director of the Artisan's Bank in this city, and had been in that capacity since the organization of the concern. On the 28th day of October last (the date of the marriage), witness was at a meeting of the Board of Directors, at which Dr. Burdell was also present. There was some discussion at the Board relative to matters concerning the Board, in which Dr. Burdell, he believed, took part. Judging from the fact that the Board generally began to sit at half-past nine in the morning and retired about eleven, he was of opinion that on that day the doctor left the bank between eleven and twelve. The next time he met the doctor was, he believed, when the Board convened on the next discount day, which was on the 31st—the discount days were Tuesday and Friday. On his cross-examination the witness gave as the reason for his recollecting those two days in particular, that Mr. Frazier, the vice-president of the bank,

tendered his resignation on the 24th of October, which was accepted on the same day, and this discussion on the next discount day was in relation to that affair. Witness had looked at the minutes at the time one of the Coroner's jurors (Mr. Schaus) went to the bank for information ; he accompanied Mr. Schaus to the bank, and aided him as far as he was able ; the minutes showed the names of the members who attended each meeting of the Board. Without reference to the minutes, witness thought that, unless he had known the date of Mr. Frazier's resignation, he would not have been able to recollect the circumstances he had just detailed as to the attendance of Dr. Burdell on those particular dates.

"After considerable, though desultory, conversation between Counsel as to the character of the evidence that would properly constitute rebutting testimony for the claimant, the Counsel for Mrs. Cunningham announced that here they would rest their case."

The attempt made on the Coroner's inquest to show that Dr. Burdell was not in New York City on the 28th of October, 1856, the day of the marriage, was effectually disposed of by this witness. No absurdity seemed too gross to be invoked in aid of the theory that the marriage was fraudulent. While it was contended that Mrs. Cunningham was an artful, designing, crafty, long-headed woman, capable of concocting and with consummate ability successfully executing stupendous schemes of fraud and crime, yet at the same time it was claimed that she, with a stupidity bordering upon idiocy, seized the occasion when Dr. Burdell was out of the city to get some one to personate him in the marriage ceremony. If he were out of the city of New York at the time, that fact, as she knew, could be easily proved. When he did go to Saratoga, after the marriage and during the latter part of the same week, at Mrs. Cunningham's request he took some money and

other articles to her daughter who was at school there. Dr. Burdell was well known at the school. The fact of his being there could be proved without the slightest difficulty. Judging from the motives which govern the human mind—especially a depraved and vicious mind—it could be set down as a certainty that if Mrs. Cunningham had been wicked enough to procure some one to personate Dr. Burdell, the time selected would have been when he was in the city, and at his own home. She could make no mistake in this regard; for he could not have been absent a day or a night without her knowledge.

It is difficult to perceive how a marriage, which for a time was to be kept secret, could be more satisfactorily and conclusively established than was done in this case. All the witnesses who had any knowledge on the subject had testified. The marriage was established by direct and circumstantial evidence of the most explicit character. Although no corroboration of the direct testimony was needed, yet remarkable corroboration had been given. The statements contained in the opening address of Mr. Clinton before the testimony began had been proved. The change of public opinion as to the guilt of Mrs. Cunningham began with the first day's proceedings before the Surrogate. The change continued from week to week and from day to day, until the community reached the conclusion that she was not only guiltless of a fraudulent marriage, but that she was entirely innocent of the murder. Public sympathy ran in her favor as strongly as it previously had been against her. She was regarded as a persecuted woman—a victim of undeserved and foul abuse without stint. Great was the feeling of kindly interest and compassion for her children, who had been subjected to such a merciless ordeal. The treatment she and they had received pending the Coroner's inquest called forth condemnation

loud and deep. Mr. Clinton having been entirely successful in the execution of his plan to turn public opinion in favor of his client, the great problem for him to solve was how to keep that public opinion at fever heat in her favor. It was the 14th of April when he rested the case before the Surrogate. The trial of his client for murder was to begin on the first Monday of May following. The Counsel of the next of kin were now to begin their testimony. What would be the effect of their evidence? Could it in any way, or to any extent, deprive Mrs. Cunningham of the benefit of public opinion, which had so changed in her favor? Mr. Tilden made the opening address to the Surrogate before the evidence for his clients began, which was reported as follows in the New York *Daily Times* of April 17, 1857:

“SURROGATE’S COURT

“BEFORE HON. A. W. BRADFORD

“Wednesday, April 16th.

“The taking of testimony in the case now being investigated before the Surrogate as to the right of Mrs. Emma A. Cunningham to a widow’s portion of the estate of Dr. Harvey Burdell, deceased, was resumed to-day.

“The case against the claimant was opened in a brief speech by Samuel J. Tilden, Esq. Instead of making a statement in detail of the facts which they expected to prove, he simply indicated in a general manner the nature of the process by which they hoped to evolve the truth of this case. This process, he said, was to compare the statement of the fiction set up to establish this claim with the greatest possible precision and in the greatest possible detail; and then, collecting from extraneous sources and studying carefully the true history of the transaction, to present in a connected and combined form those facts from which they should be able to infer what the truth was as to the particular fact which, in its nature, did not admit negatively of being the subject of direct testimony.”

Mr. Clinton, in his opening address, stated fairly and frankly the facts he expected to prove. Mr. Tilden, in his opening address, with deep cunning, as he thought, stated nothing in regard to what witnesses he would call or what evidence would be adduced or what facts would be proven. The object of this was to prevent Mr. Clinton and his side of the case from knowing what testimony Mr. Tilden's side had; so that, in advance of their testimony, there would be no way of investigating the facts embraced in their evidence, or of ascertaining whether the witnesses were reliable. Had Mr. Tilden frankly stated the names of his witnesses and the facts he expected to prove, how far the publication of his address in the newspapers might have neutralized the effect in the public mind of the evidence Mr. Clinton had submitted, or to what extent it might have turned public opinion against Mr. Clinton's client, is now a matter of mere conjecture. As it turned out, nothing could have more conduced to the success of Mr. Clinton's plan for acquitting his client on her trial for murder than the opening address of Mr. Tilden. The only way prior to that trial Mr. Tilden had of getting before the public a knowledge of the facts on which he relied to ruin Mrs. Cunningham's case before the Surrogate was by stating the facts in his opening. So far as affecting public opinion was concerned, his opening "fell flat." Hearings in the case proceeded before the Surrogate on the 16th, 17th, and 19th of April, at which last-mentioned time there was an adjournment to the 28th of April. During these hearings no testimony was given disproving or tending to disprove the genuineness of the marriage. The following is an account of the proceedings before the Surrogate on the 28th of April, reported in the New York *Daily Times* of the 29th of April, 1857:

"Tuesday, April 28th.

"This morning Counsel in the matter of the claim of Mrs. E. A. Cunningham to a widow's portion of the estate of the late Harvey Burdell appeared before the Surrogate, pursuant to adjournment.

"Mr. Clinton, on part of the claimant, applied for a postponement on the ground that he had been positively informed by the District Attorney that the trial of Mrs. Cunningham in the Criminal Court would commence on Monday, and it was necessary that her Counsel should devote all the time in the interval at their disposal to the preparation of their defence. He relied on the announcement by the Surrogate made on Saturday last, to the effect that if such a contingency arose he would postpone further proceedings in the matter before him until the termination of the criminal case.

"Mr. Tilden strenuously opposed the application on two grounds: first, that he had not received any such communication as that stated to have been derived from the District Attorney; and, second, because three or four witnesses from Herkimer were expected to-day in the twelve-o'clock train, and, as a matter of convenience to them, and to save further expense on the part of his client, it was but proper that they should be examined. But further than the time to be appropriated to their examination, he would not oppose the motion.

"After considerable discussion the Surrogate stated that he was very reluctantly obliged to adjourn the case, but he must stand by his faith in the matter. As soon as the criminal trial was ended he would notify Counsel on both sides of the time when he should be prepared to resume these proceedings, and in the meantime would order the expenses of the witnesses expected to-day to be paid out of the Burdell estate, irrespective of the result of this investigation."

Had the witnesses from Herkimer been examined before the trial for murder, the effect of their testimony on public opinion might have been very disastrous to

Mrs. Cunningham. They would have testified (as they subsequently did testify) that Dr. Burdell was in Herkimer on the 25th, 26th, and 27th of October, 1856, and that he was not, and could not have been, in the City of New York during those days. This testimony, if true, would have overthrown the evidence of Augusta and Helen Cunningham in respect to what Dr. Burdell did and said during those days with regard to the marriage. If the public had regarded their evidence as false in these particulars they would have considered it false altogether and in keeping with a spurious marriage. There would have been no time to bolster up their testimony by new evidence showing that the Herkimer witnesses were wholly mistaken in regard to dates. Had the Surrogate permitted the proposed evidence to be given as Mr. Tilden then desired, its poisonous effect upon the public mind could not have been counteracted in time. Besides, if then given before the Surrogate, it probably would have been introduced on the murder trial to show that the marriage was fraudulent; and thus would have tended to furnish a motive for the murder. It was fortunate, indeed, that the attempt of Mr. Tilden to spring the Herkimer evidence on the Surrogate, and on the public, upon the eve of the murder trial signally failed, despite his unlimited, morbid astuteness and overwhelming surplus of profound wisdom.

Some considerable time before the murder trial began Mr. Clinton had stated during the proceedings before the Surrogate that he might soon require all his time to make the necessary preparation for that trial; in which event he should expect that the Surrogate would adjourn the proceedings before him until that trial was over. The Surrogate promised that Mr. Clinton could have such adjournment any time he asked for it. When the adjournment for this purpose was asked, the commencement of the murder trial was but six days off.

CHAPTER IX

CUNNINGHAM-BURDELL MURDER CASE

Condition of the Case when the Murder Trial was Brought On.—
Commencement of the Trial.—Impanelling of the Jury.

MR. CLINTON, while engaged in the preliminary trial before the Surrogate, had not been negligent in making most thorough preparation for the murder trial. From the time the Coroner's inquest ended he had been most diligent in that regard. Although, as the leading and principal Counsel, he had substantially the entire charge of the case, he determined to select some one as associate Counsel, with whom he could divide the labor, and share the responsibility, which was very great. In New York City a large number of lawyers of ability and good position stood ready to volunteer their services for the defence. Mr. Clinton received numerous applications from lawyers, from almost all parts of the United States, offering to come into the case with him and render their services gratuitously. He was so busy he had no time to answer their letters. He has never known such a condition of affairs in any other case. Every possible detail or incident connected with it seemed to be published in all the newspapers in the United States. Not only statements, items, paragraphs, and editorials to an endless extent appeared in the Press, but lawyers and others had time to write for the newspapers long essays and dissertations about the case and every branch of it, and of everything and everybody connected with it. The newspapers printed everything they could get hold of.

It seemed to Mr. Clinton as though everybody he knew whom he met when he went into the street wanted to stop him and talk an hour or two about the Cunningham-Burdell case.

He selected as his principal associate Gilbert Dean, an excellent lawyer, of about his own age and experience at the Bar, who had recently come from Poughkeepsie to New York to practise, and who was a member of the law firm of Beebe, Dean & Donohue. Mr. Dean had been a member of Congress, and he had served two years as a Judge of the Supreme Court in the Second District. Mr. Clinton, aided by Judge Dean, made thorough preparation for the murder trial. Never was, nor could be, a case more thoroughly prepared for the defence. In fact, so thorough had Mr. Clinton been in preparing to meet by evidence *any* of the various theories the prosecution might adopt, that of the numerous witnesses he caused to be subpoenaed there were about seventy whose testimony was not required. When the Coroner's inquest ended the belief was deep-rooted in the public mind: That the marriage was fraudulent; that in the marriage ceremony Eckel had personated Dr. Burdell; that Eckel assassinated Dr. Burdell, and that Mrs. Cunningham was present and aided and abetted him; that the witness Farrell, upon whose evidence the proof of their guilt largely depended, was a reliable and honest witness, and that the facts he had stated in his evidence were true. Mr. Clinton, by the evidence adduced before the Surrogate, had already shown that the marriage was genuine; and he had abundant and overwhelming evidence to show on the forthcoming trial that Farrell's testimony was absolutely and entirely false. Mr. Clinton took quite a number of persons to 31 Bond Street on a bright moonlight evening, and made experiments in order to test whether by human possibility the facts testified to by

Farrell could have occurred. A portion of his force was stationed in the room where the murder occurred; another portion was stationed on the front steps where Farrell, according to his testimony, stood. Those inside tramped loudly in the hall and on the stairs in ascending to Dr. Burdell's room, and upon arriving there made noises such as Farrell testified that he heard (except that the noises were much louder); they made loud and agonizing shrieks; one of them came to the front door, and opened it as Farrell said the one he supposed to be Eckel did. Those on the front steps, although listening intently, heard no noise in the hall; they heard no noise in Dr. Burdell's room; and, although well acquainted with the one who came to the door, they could not recognize any of his features so as to tell who he was—in fact, in their respective positions they could not tell whether the face was that of a black man or a white man. Mr. Clinton and those with him made various experiments by which they demonstrated that it was impossible that Farrell's evidence could be true. On the night of the murder it was dark, and if Farrell could on a light night have recognized a person in the location in which he placed Eckel, he could not have done so on that night. Besides, Farrell was near-sighted, and could with difficulty, under the most favorable circumstances, recognize anybody or anything more than a few inches distant. Had Farrell been called as a witness on the murder trial, the overwhelming contradiction and impeachment of his evidence would have been very disastrous to the case of the prosecution.

When a notable or sensational case is, by means of the Press, conspicuously brought before the public, offers of evidence in respect to important facts flow thick and fast upon the Counsel engaged, to an extent that is extraordinary and sometimes shocking. Those who thus offer themselves as witnesses not unfrequently have no knowl-

edge of the facts to which they propose to testify, or they locate facts which transpired at a time unimportant as having occurred at a different time, which, if true, would render them of the highest importance. Then, again, the love of notoriety—the vanity of being connected with a celebrated case—sometimes causes their imagination to run wild, so as to make them think they actually do know facts of which they are totally ignorant. Sometimes (although it is generally otherwise) those who thus offer testimony expect to reap some immediate pecuniary profit. The motives of persons who thus seek to foist themselves into celebrated cases Mr. Clinton never could fathom. While preparing for the trial, it seemed to him as though offers of this kind, and written communications sent him through the mail and otherwise, were endless. He received several written communications from persons, each of whom avowed that he, and he alone, committed the murder. These Mr. Clinton handed to the District Attorney to make such use of as he saw fit. Among other offers of testimony was the following: Two or three persons of apparent respectability and intelligence called at Mr. Clinton's office and stated that they were with Dr. Burdell at a certain gambling-house during the evening he was murdered; that he remained there until late at night, played heavily, and won; that the money was paid him in bank-bills of a large denomination, which he rolled up and put in the watch-pocket of his trousers; that those of whom he won the money followed him to 31 Bond Street—the persons who offered themselves as witnesses following behind them. They stated the exact location of the watch-pocket in Dr. Burdell's trousers, and asked Mr. Clinton, in order to satisfy himself of the accuracy and truthfulness of their statement, to examine the trousers and see that the watch-pocket was located as they had stated. Mr. Clinton told Judge Dean of these statements, and, out of sheer curi-

osity, not placing any reliance on the truthfulness of the proposed evidence, they went to the District Attorney's office—the clothes Burdell had on when he was killed having been taken there—and asked to see his trousers. On examination it was found that they *had no watch-pocket in them*. These would-be witnesses supposed, as a matter of course, there was a watch-pocket, and, upon finding it, Counsel would believe that their proposed evidence was sufficiently corroborated. Those most profoundly versed in psychology can never account for the morbid desire of many to be in some way connected with celebrated trials, especially criminal trials. Some shocking illustrations of this kind were furnished years after the termination of the trial of Mrs. Cunningham. Several persons (Mr. Clinton thinks three, if not four) who were convicted of murder, and about to be hanged, confessed to the murder of Dr. Burdell. Each one stated, as a part of his dying confession, that he, and he alone, unassisted by any one else, committed the murder. These dying confessions were made public after the persons making them were hanged. Mr. Clinton read the confessions carefully. So far as the statements in them were confined to a few simple facts relating to the case, which appeared in the newspapers, they were moderately correct; but when they referred to facts and circumstances not in the newspapers, but such as those acquainted with the parties—and especially the Counsel—would know, such statements were sheer fabrications. Mr. Clinton readily perceived that each one making such dying confession knew nothing about the facts of the Cunningham-Burdell murder case, except such as could be gleaned from the public newspapers; yet each left the world with a desire to be known to fame as the perpetrator of the most distinguished murder ever committed in the United States.

On Monday, the 4th of May, 1857, the trial of Emma

Augusta Cunningham (otherwise called Burdell), for murder came on in the Court of Oyer and Terminer of the City and County of New York. Hon. Henry E. Davies, Supreme Court Judge, presided. It was thought by many that on account of the great publicity of the case, and the extent to which people had made up their minds with regard to the guilt or innocence of the accused, it would be difficult, if not impracticable, to obtain a jury. Yet the selection of an intelligent and impartial jury occupied only one day. The following are the names of the jurors: Gilbert Oakley, Chauncey L. Norton, Francis K. Gehagan, William D. Lockwood, Charles F. Hunter, Luke C. Coe, John Green, George Tugnot, David W. Doughty, Frederick A. Gaetz, John Archibald, and Gilbert W. Barnes.

CHAPTER X

CUNNINGHAM-BURDELL MURDER CASE (CONTINUED)

Opening Address of A. Oakey Hall, District Attorney, to the Jury,
Delivered May 5, 1857.

ON Tuesday, the 5th of May, Hon. A. Oakey Hall, District Attorney, on the part of the prosecution, made the opening address to the jury as follows:

“ May it please the Court and Gentlemen of the Jury :

“ The duty is assigned to me by the prosecution of preparing, in the usual legal way, your minds to receive the evidence which the prosecution, under the rules of law, will offer in support of the indictment upon which this defendant at the bar was yesterday arraigned. The prosecution proposes to prove by the testimony, which it deems, in its chain of progression, though formed of small, and to some extent delicate, links, a perfect chain of mental conviction; we propose to prove that one of your late fellow-citizens, Dr. Harvey Burdell, whose dying moments were with the dying moments of the first month of this year, for towards midnight on the last day of January he ceased to be your fellow-citizen—but to you, as jurors, his memory survives—we propose to prove that this gentleman was murdered with malice aforethought; that he was murdered in his own house, surrounded by the sanctity of his own home; that the deed was premeditated; that all the circumstances show that; that it was a deed which shows upon its very impression the marks of dreadful hate, a revenge for some injury unatoned for in a mortal consciousness; that by the circumstances, some one in that house, which was his house, did the deed; that there

is a total exclusion of every person in the world from the circumstances of the case; that among the inmates of that house was one who, more than any other person in the world, had the motive, with malice aforethought, to premeditate and accomplish that horrible deed; that that person was a woman—was this defendant; and that clustering around all these circumstances is the irresistible mental conviction that that deed was the deed of a woman—a deed to a great extent unartificial—a deed planned and contemplated from a different standpoint from which men of the world contemplate crime, perpetrated to a great extent with that ignorance of human nature which, compared with men of the world, woman at all times in history have possessed and at all times in our own history claim. You will perceive that there is an instant distribution here of the persons—the dead and the murderer—to the circumstances clustering round them both. You will confine your attention to two parts of this whole case—that part which relates to the persons, and that part which relates to the circumstances. And who was the person? A citizen against whom no reproach had been raised—a citizen who was said to have enemies, but so far as the prosecution have been able to extend their investigations, who had no enemy, whom you can call an enemy, but this woman.

“It surely needs no words of mine to recall to each of you the sensations and the convictions which filled your breasts, when, in the morning, at your breakfast-tables, you read of this horrible deed. It needs no feeble words of mine to bring before you the feelings which you, as fellow-citizens, had regarding the effect of such a crime upon the world at large if it were undiscovered and unavenged, in the language of the law, by the speedy and the retributive arm of justice. When you stole to your homes at night, glancing up at the little lights in the streets, as if some fell and dark shadow of death was upon your path; when, as you closed your door and bedroom window, you looked to see if, peradventure, the shaft of the inevitable destroyer were there in the hand of some murderer, the hand of some unknown

enemy of yours. No, gentlemen! I recognize each one of you as a citizen of a metropolis to whom circumstances of this kind have become familiar and household reflections.

“He is dead, and the cold word of charity may say: ‘Let his memory be forgotten’; and she who was his deadly enemy in life lives, and, as yesterday upon that stand, as witnesses regarding your own purity, your own integrity, and your unconsciousness of bias or prejudice towards her, as she challenged you in the language of the law, so to-day, as she sits there—a veiled picture of sorrow, as the world would say—she challenges you to-day as jurors by her looks, demanding the sympathy which belongs, not to a murderess, but to a woman; and day by day, as you are to sit here in the discharge of a solemn public duty, she will continue to challenge your sympathy; and eloquence and ingenuity will come to her aid, and at every step of this testimony the thought will be forced upon your minds by that eloquence: ‘Remember, gentlemen, you are trying a woman.’ We appreciate fully the difficulties which the prosecution labor under from the outset, but in the discharge of our duty we shall mince no words before you, gentlemen. Crime has no sex; crime has no peculiar attribute of its own; no differences, when it settles, in the one breast of the man, or the other breast of the woman. You are not here to judge the woman, but the crime; you are not here to pronounce alone upon the woman, but upon the person who is named in the indictment. Oh! it is no wonder that all these holy associations that cluster around the name of woman should force themselves into the jury-box when a case of this kind comes before the public eye. When we remember the mother of our prayers, when we remember the sister of our household adoration, when we remember the wife of our life until death, when we remember the children who are to be the future women of the world, that sit upon our knee, and we feel as we look upon young girlhood and growing maidenhood, we say, can it ever be that this being, upon whom God Almighty has put his own seal of purity, should ever live to be the perpetrator of crime, the midnight assassin,

to cherish hate and revenge and jealousy? And yet, when we open the book of history, we are forced to come to the conviction that crime knows no sex. While in our earliest studies of Romish history we read of her who, having murdered her husband, the servant of Imperial Rome, drove her chariot over the dead body of her father; and in the time of Imperial Rome the name of Messalina has become an historical word; and Fulvia, when the head of Cicero was brought to her, she spat upon it, drew from her bosom, which had nourished children, a bodkin, and drove it through the tongue until it quivered; and the same dramatist who speaks about the wife of William Tell will speak of her who forswore the very maidenhood purity of her name—Agnes, Queen of Hungary, who bathed her feet in the blood of sixty-three knights, and said, ‘It seems as if I were wading in May dew’; and the same evangelist who speaks of her who was last at the cross and first at the grave tells us in the same gospel of her who bore upon a charger the head of her deadly enemy, the forerunner of Him who was the Saviour of the world—

* * * “I was a woman once,
A thing to nourish children at my breasts,
And hear their angel-whispers in my dreams,
But now, with sorer travail, deeds of wrath
And ghastly horrors take their birth from me.”

“Remember the relationship which existed between the gentle and the loving Cordelia and the infamous Regan and Goneril; and the same hand who drew Rosalind, Cecilia, and Beatrice has handed down to immortality—for there is an immortality of infamy—the infamy of that Lady Macbeth, a prototype of just such a woman as this defendant. I deem it my duty to call up this woman, and to adjure you to remember that there may be sometimes only so much of a woman as will be left in the body; but the mind, the immortal mind, is that original immortal mind that became the original fiend. All through life, since she knew him, she pursued him with a fiendish hate, jealousy, and a

fiendish revenge, until the knife of this woman-fiend found its unholy repose in the heart of him whom she thought to have made her own. Deem not, then, that I am wasting your time; deem not that, as, pausing in the testimony, I make these references. The prosecution labor under this disability of sympathy. We call upon you, as reflectors of history, as acquainted with human nature, as able to lay out of your minds all your previous sympathies, to look upon the deed which we shall translate before you in the evidence from the witness-box as a simple deed of malicious, horrible, revengeful crime. She had known him three years, and she said he was the father of a child who never saw the light. She was his mistress, though she claimed to be his wife; and if I shall show by this testimony to you that she deserves, from her own words, no sympathy, no respect, then, to that extent, I have done my duty. And I challenge you, in all this testimony, and I challenge the eloquence of my learned friends upon the other side, to find in this evidence one iota of testimony which shall show her to be other than I have described her by reference to history and the testimony. She was jealous of him; she haunted and hunted him up-stairs and down-stairs, in his privacy and publicity; she was in this world that picture of remorse to the man—if remorse he could have—when thinking of his acquaintanceship with her, while, if he died, the fate of an unbeliever awaited him. The very domestics will take the roof of that house off and let you look into the depth of moral degradation which clustered around this woman. Why, in olden times, the moment you started with a woman who, in a house with her own daughters, had prostituted herself in crime, would fitly go beside that person—that woman in form, though fiend in mind. And the domestics will tell you how she hunted and haunted him. Police officers we shall bring to you, that came from the street at his bidding to settle the quarrels that clustered around him. A police officer who came there in September and saw this woman strike him; other officers who came in later, who heard her asseverate that she was his wife by

every tie on earth—morally perhaps she was, and morally perhaps she is; and even their quarrels were forced upon the public through the lynx eyes of these policemen who were called in. And there was litigation between them. She sued him, claiming that there had been a breach of promise of marriage, and that there had been seduction. Those suits were dated in October, and the quarrel comes down to the very night of this occurrence, when she followed him to the door with the dreadful threat upon her lips, which we shall show to you. Those suits were settled, and most extraordinary papers were drawn up and signed by him—this hunted, haunted man, by this fiend in human shape—papers which you would shrink from—which you would not sign, unless you were convinced that she who commanded it was your mortal enemy, unless you had upon your soul the dreadful presentiment which was upon him.

“And they came to the house of an intimate friend of the family, Dr. Thompson, and forced their quarrels upon him, she following him into the house, as the doctor will tell you. She, with the sly cunning of her sex, took domestics into the room next door to his, saying to them: ‘Now, listen to the words that occupy the time between the doctor and myself.’ Her spies, she thought. Ah! not so, thou artful woman [turning towards Mrs. Cunningham, who did not look so very artful]. The spies of justice, who will be here to-day to tell what passed between you and that dead man—to tell what passed between them—words so loathing that even the domestics shrank in horror back to the kitchen, to remember well for future use what they had heard.

“And there came to the house one day he who sits in Court—a man that neither you nor I would quarrel with. The greedy, lustful eyes of this woman-fiend were fastened upon him, and by the evidence in this case—irresistible, and not to be confuted—he became, in one story, the counterpart of him who had been her paramour on the story below. And she did love him—she did love him, this man Eckel; and she, the mother of daughters who were themselves candidates for marriage, fastened her greedy, lustful eyes upon him. I

have nothing now to say of him. Let him be taken care of hereafter. But this we must not forget in this case, as step by step there is progression, that whether she was the wife of the murdered man or his former mistress, in either case she was alike guilty of the grossest infidelity in her conduct with him who occupied the apartment adjoining her own. He had made up his mind that life to him was useless so long as he had this shadow at his side, and he had made up his mind to let that house, of which she was the tenant and he the landlord, to another person. And she heard of it. She saw that which was going on, and, gentlemen, on the very night before the murder, the very respectable lady who was to have become the tenant of that house for the year commencing last Friday was going through the house, meeting the servants, and, seeing her going out, she still, though he was absent, pursuing him, comes down before one of these domestics and says: ‘Hannah’ (which was the name of the cook), ‘what was that woman doing here?’

“‘Why, madam, she was looking through the house.’

“‘Is she going to take this house?’

“‘Yes; they’ve been looking all around in the kitchen.’

“‘Is Dr. Burdell going to let this house to her?’

“‘Yes; it looks so.’

“Then she said—and the woman of the world would not have said what fell from her lips—‘Before to-morrow morning he shall be a corpse,’ or ‘He may be a corpse’; and on that very morning she had said to the boy that the doctor was a very passionate man and might not live another day; and on this very Friday—this superstitious day, the day before the day which was to turn her out of the house and to put this other person in there—on that very night the deed was done. On the very day that this newly found tenant had come to inspect the house the murder is done. The doctor was a regular man. His outgoings and incomings were regular. She had watched them. She knew them. But there was a highly honorable man who had no part or parcel in that household, who lived in the third story—he who, occupied with professional and public cares, had little

knowledge of the infamy that clustered around him. She went to him on this very Friday as he was going out, and, by inquiring about his fire, gained from him the knowledge that it would be midnight before he returned ; and in the hearing of Dr. Thompson—in his hearing she says to Dr. Burdell : ‘What time will you return to-night?’

“Her own household she could take care of. There was her paramour, whose interests were subservient to hers. There were her daughters, whom we would not, except in a court of justice, accuse of a misprision of treason in trying to shield their mother. There was a boy, young in years, it is true, but at the same time as artful a boy as you ever set your eyes upon. There was the cook, who, wearied by the toils of the day, would sink away into profound forgetfulness as soon as her head touched the pillow. There were the little boys, who slept in the innocence of childhood. Why, gentlemen, in the whole annals of murder you will never find an opportunity so carefully provided for as the opportunity given by this woman on this night to murder her enemy. The up-stairs lodger out for all night ; the exact time given from his own lips when he was to return ; her family to be taken care of—but, ah, the cook ! One domestic had gone ; there was only one left in the house, and she must be got out of the way. ‘Oh!’ said this lying woman on the stand—and the discrepancy is enormous ; the very hand of Providence is in this incident—this lying woman, on the stand, said : ‘I rang the bell for the cook to come up into the parlor, and the cook came up into the parlor and received her orders for the next day, and I dismissed her to bed.’ Why ! see what the cook will say when she comes upon the stand : ‘Mistress, you came down into the kitchen with this paramour of yours, and—a thing you had seldom done before—you ordered me to bed, although you knew I was the only servant in the house, and had a double duty to perform.’ And so, on this Friday night—the lodger out, the cook sent up-stairs to bed, the family disposed of—she has this deed ready. She has once stolen his safe-key ; she has once stolen his pistol ; she has a dagger of her own

—and everything is ready for his coming ; and she who had always haunted and hunted him, as you will remember on the testimony when it comes to be offered before you—I pray your attention to that—who had watched him on Friday, who had watched his conversation with Dr. Cox—who will be upon the stand—and with Dr. Blaisdell—who will also be upon the stand—was watching for his coming.

“Now, we shall show to you that the situation of that house utterly excluded the interference of any outside person ; we shall show you that when the boy came there in the morning the basement door was locked, and when he went out of the yard the egress there had been shut off ; and on the front door was one of the most wonderful locks that can be found anywhere. Three of the latch-keys he had in his pocket, one was in Mrs. Cunningham’s possession, another was in Snodgrass’s, another in the lodger’s, another with Eckel—making the whole set and none missing. And when he came, there was following in his steps—they may say—some enemy, who could have stabbed him to the heart, and run less risk of detection in escaping from the house, with bloody garments and a trail behind him. He comes in alone ; his apartments are entirely secluded and locked up ; she has the pass-key, and she alone, to the front room where his bedroom was. He has the key of his back room in his bag ; he puts it in the door ; he opens it ; he goes in. The shawl was found folded on the sofa and the cap carefully disposed of. In the dark he is supposed to fold his shawl ; he is supposed, on the theory which they offer, to put away his own cap, and his shoes flung off in an instant before the fire, before the gas was lighted. And, gentlemen, the physicians will tell you that which contradicts popular ideas upon this subject—if it is correct to speak of popular ideas as matters of history clustering around this case—that every particle of mortal injury which was done to that man was done in the briefest possible space of time. Wherever struck, which is for you to find out hereafter from the testimony, whether in a sitting posture by the fire, taking off his shoes, whether in throwing off his

shawl, by some one who met him at the door, who had a pass-key, and who had entrance, and who could wait for him ; but whether struck there or here, this one damning fact will come out, that whoever struck that blow was probably a left-handed woman ; and she, left-handed, carefully watched in the prison to see it, and the domestics of the family swearing so.

“ I shall have a model, perhaps, this afternoon, full and entire, and will give you a complete entrance to all the localities of this catastrophe. But this I may say, that by the door to which by his natural instincts he would rush, by the door in the corner, some one behind him gave him a blow in the left side of the neck, and there is the life-spout on the door. The wounded animal turns, the hunter tells you, in a direction from the blow ; it is so with a man ; he turns, and only one kind of blow could have been given ; that is the left-handed blow—not downward but upward—in the heart. In fifteen seconds he staggers a few steps and falls—a dead man. Oh ! says my learned friend, we insist that this was not a premeditated murder ; it might have been justifiable ; it might have been excusable homicide ; it might have been manslaughter. It would be hardly fair in me, perhaps, to say, or to ask, was that idea the faintest reflection of a client’s confession ? and I shall not ; but I will ask him in his candor and fairness, as the Counsel before the jury, to say where are the circumstances and the marks which show upon that murdered man’s body anything that would excuse, anything that would justify, anything that would show the blows of mere spasmodic passion, which in the cooling of time would bring the hour of remorse. No, gentlemen ; fifteen wounds upon that body speak—the wound in the neck, the two in the heart, the wound over the right shoulder, the wound in the wrist, the three wounds in this arm, the wound in the abdomen, another wound in the right side of the neck—speak not of blows of spasmodic, temporary passion, for cooling time to bring regret—speak not of the blow of self-defence against some sudden attack which the law would place in the category of justifiable

and excusable homicide. They show the blows of revenge, hatred, and malice, that, even when the man was dead, and the life-tide flowing rapidly from his heart, and his soul gone to his last account, could again and again place the stab upon the senseless corpse, to make assurance doubly sure, to render it a thing of certainty that his enemy had gone, that this discarded paramour, this victim of jealousy, of hate, and revenge, this victim who had dared to make an appointment for the next morning to set his hand to paper to bargain away her rights of property and her home, this victim who died in fulfilment of bloody threats that had not yet cooled away from her lips; whoever did that deed was in all probability covered from head to foot with blood; blood upon the dead walls; blood upon the dead doors; blood upon the dead furniture—no figure of romance when the advocates speak about a pool of blood around the weltering, dead corpse—little marks of blood upon the carpet, drops that had fallen from something—from the bloody dagger, from the bloody sleeve, from the bloody form.

“There was the safe—the safe which once before she had robbed, upon which she had committed the petit larceny of stealing papers—that safe was found next morning not with the catch down as the careful man of business leaves it, but a little up, showing that it had been entered, as it could be, for the key was in his pocket. And his hands were found laid down, carefully disposed, with his limbs carefully laid out—not the way a man would fall in his convulsive death-throe, but as a man might lie, laid there by another hand; not the hand of a man that would escape into the street, but the hand of a man who had the pass-key of the house, who could reach outside of the door to take the key in and let fall those three or four drops of blood that tell the dreadful tale. He fought, no doubt, with the desperation of a whole army; and he fought with the whole army of miserable, pestering hates which cluster in a woman’s heart.

“‘Heaven hath no rage
Like love to hatred turned,
And hell no fury like a woman scorned.’

“Scorned she had been—scorned to her acquaintances, scorned to her face, scorned to her domestics. Into no other breast but hers came that night that hell that hath no fury like a woman scorned ; and by every hypothesis it was the hand of some one who knew that house, who had the time to stay ; and in that room back there sat a silent watcher, a sick man, and saw the form of some one in there—a man whose evidence has never been given to the public—and though it forms in itself the essence of a very small circumstance, it shows conclusively to the mind of the prosecution that there was no haste about that thing ; that it was as deliberately followed up as it had been deliberately planned and promptly and efficiently executed. There lies the dead man, the shadows of midnight falling round him and the crime, and she alone with him. I choose to make no charges yet against those who were in that house ; she stands alone in this indictment, and alone we are at present trying her. I choose not to ask you to picture to yourself the aid of a child, and that child a daughter, let the circumstances give their own solution to each of your minds ; and in contemplating this catastrophe you must irresistibly be led to think that the deed was the deed of some one in that house ; for, locked and barred as it was, it stood as much alone, although in a popular city, as if it were in a hamlet or on a heath. There lies the body, carefully and decently laid out. Who but a woman, whose artfulness and cunning only go to a certain extent, would ever harbor in her thought that persons would take that man to be either the suicide—a man who had died by his own inanition—or a man who had been murdered by some one who escaped as hastily and as rapidly as he came ? Who but a woman would have laid that head so near the door that it was very difficult to turn the door ? Who but she should have a pass-key to leave by the other room ? There is a fire in that room, and a wash closet close at hand ; the lodger is not to come in until twelve o’clock ; the moments are precious—and precious moments have their haste as well as their desperation. The lighter garments can be burned in this fire, but then the woollen

cannot, and there is a smell of leather. If it were to be burned there, the odor would go through the house ; if it were to be burned in the kitchen, the odor would go through the house. Carefully taking the clothes necessary to be taken, she ascends the stairs, passing the cook, who was profoundly sleeping, into a room seldom used, where a fire is made. Another watcher is opposite—Dr. Parmly. He had lived there long, and he was an observing man ; and there is a curiosity about men, as well as women, to know the ways of those who live near them. He had often noticed that they had a dark room little used ; but this night, looking across, he sees a light flashing up and flickering as if something strange were being placed on the fire, and then the passers-by perceive in the air this odor of burning woollen and leather. Their attention is specifically directed to it at that house.

“Thus you perceive everybody excluded, she with the motive, with the opportunity, with the motive and the opportunity, with the lodger out, with this light to be accounted for by her to you ; because these physical signs are to be accounted for by explanation destroying the evidence of her guilt. All night long he lies there, and the gas, which has been lighted, is burning ; it is found next morning, and the key is on the outside ; his watch is stopped at half-past six o'clock in the morning, showing that the deed had been done almost at the moment he entered the room, as he had no time to lock the door and wind his watch. And they upstairs, she, the former mistress, the wife, as she says, upstairs, merrymaking. Word is brought to her by the inmates of the house and the neighbors that Dr. Burdell is dead. He is dead ; they tell her so. What, gentlemen, is the instinct of the man or the woman, not to say the wife or relative, or even the friend ? There is one of two things—either the fainting and the unconsciousness at the dreadful news, or the rushing to see if it be true. She was ready to act her part. She does not go down ; she has her great apparent agitation, but no redness of the eyes of any consequence ; and when Dr. Main comes in and says, ‘Dr. Burdell is dead,’

she says, 'Oh ! I am so glad to hear that'; not to see it, for even then she had not gone down-stairs to see it, and even then she had not gone down-stairs to render that duty which, as a wife, she had sworn to render. 'I am so glad to hear that, for I thought he was murdered,' and, almost instantly, 'I have a dreadful secret to tell you,' she says, to this one and that one, and out comes the marriage certificate; 'my name is Emma Augusta Burdell ; I was married to the doctor ; here is my certificate.' No going down yet to see whether he were dead or murdered, but moving about the room, spasmodical in one corner, calm in the next, theatrically tearing her hair in another place—the same feelings in her breast that were there on that night when the Coroner sent up to examine her as a witness, and said, 'I won't come unless I have Counsel.' Why, what has this woman to do with Counsel ? If it were her duty to see if he were dead, it was doubly her duty to protect the character of her house and children, and to rush down to explain, if she could. At that time she was at liberty in her house, and the son-in-law of the Coroner himself was her Counsel. He was there through Sunday, until she perceived herself that abler Counsel than he was needed, and my learned friend came to her aid and succor and to close her lips thereafter.

"I shall ask you to say that every single attribute was the attribute of a dramatic person. She had a fur cape drawn up about her neck when she did come down to testify, but not so high that a watchful witness could not see the redness upon her neck, the counterpart of that mark around his neck. The cord placed around his neck, whether it be the cord of a muffling woollen bag, or the cord that a woman knows so well how to use, the counterpart of the mark upon the one was upon the other, and one disappeared as rapidly as the other. Had she thought of strangling him to take him into the street, and, when he fought so desperately, as the wounds in his breast attest, did she not dare ? Gentlemen, I call your attention to that ; it is a strong and important fact in the case ; every little bit of her demeanor on that morning is worth your while. For see ! A murder is

planned, and no one knows it but the planner ; there is an ability to dispose of everything ; there is an effort to cover up the base act in one's own house ; and yet the prosecution are not bound to bring before you the man who saw the deed done, for he might lie, and he might be the enemy himself.

“The prosecution will bring before you such circumstances as convinced twelve men, as they swore yesterday, that that was done by somebody in that house. Away with justice forever, if circumstances like these do not call, trumpet-tongued, upon the defence to reverse the rule of law ; let the innocent prove that he is not guilty if he can. Now see ; group these circumstances this way—the circumstances anterior to this very week. The week commences, as I find, with a quarrel, and the domestics hear it, and light words about his death pass upon the tongues of some of the family. This week progresses with quarrelling, and terminates with murder. Then, the circumstances occurring on that day, the near approach, the signing of the paper, the watching during the day, the inquiries about the time that this and that man would be in, the circumstances of the murder itself, the fifteen wounds of fiendish hate and malice and revenge, her conduct next morning, her evidence before the Coroner's Jury contradicted in the most vital part, her demeanor in the afternoon, her refusal—for we shall make that a point—afterwards to testify in this thing while she had the opportunity, and while peradventure she might turn the tide that was overwhelming her in the public estimation.

“And then, if it come to appear, as I think it must, that that deed was done by some one in that house, we ask who did it, who had the motive ? Was it she who hated him, who scorned him ? And he had scorned her, and had cast her off, and was about to cast her homeless into the world. Was it she who had threatened him, and had obtained, by threats and menaces, the signing of papers which, as I said before, the threats of few men would accomplish ? Was it she who had the dramatics in the morning, who had such a tender wish for Counsel in the afternoon, when she was

made a witness? Was it she who went into mock-heroics over his body? I shall greatly mistake your comprehension if you do not arrive at the conclusion that it was done by some person in the house, and by her who had a motive, who expressed a motive by threats, upon the very eve of its consummation, who had the ability to do it and to conceal it; and having spread these facts before you, we shall call upon our learned friends upon the other side to say what of this motive? who has a greater? What of this hatred and revenge and malice? Where is there another who had greater ability to do and to conceal? How could entrance have been obtained to that house? And if they shall fail in that, we shall claim hereafter, when the evidence which I have outlined shall be fitted together, to say that woman, whether she be called Emma Augusta Cunningham or Emma Augusta Burdell, whether she be the mistress or the wife, whether she had the simulated or the real marriage, that she—woman though she is—was guilty of the crime.”

CHAPTER XI

CUNNINGHAM-BURDELL MURDER CASE (CONTINUED)

Witnesses who Testified for the Prosecution—Condition of the Case when the Prosecution Rested.

THE prosecution occupied Tuesday, Wednesday, and a part of Thursday with their evidence. The following witnesses testified for the prosecution: Dr. J. W. Francis, Hannah Conlan, Mary Donohoe, Dr. Stephen A. Main, Daniel Ullmann, A. De Witt Baldwin, Edgar Davis, Silas C. Herring, Hector Moore, George W. Dilkes, Dr. Erastus Wilson, Warren Leland, Samuel Parmly, Edwin H. Stone, Daniel Olney, William H. Butler, John H. Thompson, Dr. George F. Woodward, John Connery, Dr. David Uhl, Edward D. Connery, Andrew L. Burns, Frederick Fredericks, Mrs. Schartzwaelder (wife of Colonel Schartzwaelder), Colonel Christian Schartzwaelder, Mrs. Foster (Matron of the City Prison), Mrs. Lavinia Phelps (Night Matron of the City Prison), John W. Blivens, and Benjamin F. Maguire.

It was rather late on Thursday afternoon when the prosecution rested. No attempt had been made to show that the alleged marriage of the defendant to Dr. Burdell was fraudulent. No evidence showing anything of that kind had been given. The testimony produced by Mr. Clinton before the Surrogate had so thoroughly proved the genuineness of the marriage that the prosecution thought it useless, and worse than useless, to seriously raise any issue before the jury on that subject. Farrell, the only witness who gave any direct evidence before

the Coroner implicating Eckel and impliedly implicating Mrs. Cunningham in the murder, was not called by the prosecution. If the evidence he gave before the Coroner was true, it was as early as ten o'clock Friday evening, the 30th of January, that he was upon the steps of 31 Bond Street and heard the cry of "Murder!" and the noise made by the murdered man, after which Eckel came to the door and ordered him away. If the prosecution had believed in the truthfulness of Farrell's testimony, he would have been produced as a witness. They must have been satisfied that his evidence before the Coroner was false, or he would have been called. Had he been placed upon the stand, the prosecution would have been bound by the theory that the murder occurred about ten o'clock. At that time Mrs. Cunningham, her two daughters, her two sons, Snodgrass, and Eckel were all up and about the house. It was after eleven o'clock when they retired for the night. Had Farrell, when on the steps, with the front door closed, heard the cry of "Murder!" and the noises made by the victim, of course the inmates of the house must have all been cognizant of the murder. Such an idea was preposterous. Another and insuperable difficulty would have been encountered had the theory been urged that the murder took place at or about ten o'clock that evening. A gentleman who knew Dr. Burdell stated that he saw him in the street that night an hour or two or more after ten o'clock. He thought it his duty to disclose that fact to the prosecution, and offered to testify to it. He also disclosed the same fact to the defence. Either side could have called him. He may have been mistaken in respect to the night. It may have been the preceding night he thus saw Dr. Burdell, but he was positive that he was not mistaken.

The fierce, bitter, and extravagant opening address of the District Attorney had led the public to believe that

he had some new and startling evidence of the guilt of the defendant to be submitted to the jury ; but when he rested, having produced only evidence, and that greatly diluted, with which the community had been familiar weeks before the trial began, the reaction in the public mind set in stronger than ever in Mrs. Cunningham's favor. Mr. Clinton's confidence in her acquittal, in his own mind, now amounted to a certainty.

CHAPTER XII

CUNNINGHAM-BURDELL MURDER CASE (CONTINUED)

Opening Address of Mr. Clinton to the Jury on Behalf of the Defendant, Delivered Thursday, May 7th.

“ May it please the Court—Gentlemen of the Jury :

“ Although not altogether unaccustomed to conduct capital cases on the part of the defence, I have never before risen to address a jury under circumstances like those surrounding this case, where, at the close of the evidence for the prosecution, the Court, the jury, and the Counsel, one and all, felt that there had been a failure—an utter and entire failure—to point the finger of rational suspicion at the prisoner at the bar; that the prosecution—as if led on unwillingly and resistlessly by a gracious Providence—had proven, beyond a peradventure, that the defendant was entitled to an immediate and triumphant acquittal. Let justice and humanity rejoice that the *evidence* of the District Attorney has forever silenced the batteries of his opening speech. My learned friend, as if he feared that a woman, who, since the 31st day of January last, has been hunted down as though she were a wild beast, would, when she came within the hallowed precincts of a court of justice, have exhibited towards her at least the outward forms of decency, saw fit, in advance of a word of testimony, to denounce her as the worst woman God ever created—a woman who you would think by his description *had been commissioned by the monarch of*

hell as his special vicegerent on earth. I have often listened with pleasure to the addresses of my learned friend in capital and other criminal cases; but what was my surprise when I saw that he, usually so fair, so candid, so cautious, and so just, had overstepped all bounds of moderation, and, not content with stating the facts which he expected to prove, had ransacked the classics and travelled over all history, sacred and profane, ancient and modern, with the view of calling to his aid female fiends, as fit illustrations of the desperate and abandoned character of my client, with which to garnish his speech! However, gentlemen, that pelting storm of vituperation was fraught with one consolation; for if this defendant was ever in danger, the opening address of the District Attorney has rendered her acquittal as sure as that Almighty God shall permit you to live until you arrive at the end of your duties in this case.

“In the brief observations I have to offer, I shall not go over all the evidence adduced before you, nor shall I, as the District Attorney supposed, seek to portray the sorrows which my client has suffered. He asserted that she came before you a veiled picture of sorrow—an arch-hypocrite—that the suffering she seemed to have experienced was entirely feigned. She does come before you a picture of sorrow; and, unfortunately, as she comes before you with the weeds of widowhood, truth forces us to concede that it is not the first time she has been called upon to deplore the loss of a husband. I will not attempt to depict to your minds the agony she suffered, when, scarce three years ago, the husband of her youth was laid beneath the sod. As she lay stretched upon a bed of sickness, herself about to cross the confines of eternity, as she believed, she was told that the thick shadows of death had already settled upon him—that his spirit had winged its way to a better world. She

put her trust in the widow's God. Aye, she has faced affliction before, and come through it unscathed! Afterwards, rapidly but smoothly, she was borne down the stream of time, until dashed upon an epoch in her history of fearful moment. Suddenly there shone out from the horizon of her future, not the star of Bethlehem, whose serene, hallowed light pierced the darkness of her affliction as the grave closed over the lifeless form of her husband, but, alas! the star of destiny, which shed its baleful light upon the ill-fated union of herself with Harvey Burdell.

"The District Attorney told you that she haunted that man for three long years, that she dogged him at every step in public and in private, that she was his persecutor—his tormentor. Gentlemen, has the District Attorney proved any such state of facts? I concede that he was in error—if you please, honestly mistaken. He knew not that Harvey Burdell sought her; that he importuned her with his attentions; that he courted her; that he paid her every attention which an honorable man could pay an honest, intelligent, high-minded woman. There are those (and not a few) within the sound of my voice who know not only that she did not haunt him—did not seek him—but that he sought her—was profuse of his attentions to her—was ever ready to introduce her to his acquaintances, with whom he wished to stand well—to present her to the best and most respectable acquaintances he ever had. Aye! there are those present who *know* he was best pleased when he was heaping most honor, as he thought, upon her. Why did the District Attorney make that statement? Did he suppose he could prove it? Did he believe it was subject of proof? He did not expect, within the rules of law, as it strikes me, to prove anything of the sort. Yet, gentlemen, why should he—usually so fair—make a statement embittered with slander like that? Was it

that he thought you would be influenced by declamation to disregard your oaths? I can hardly think that. Why was it? Let him, in his subsequent remarks, if he shall address you, inform you upon that point.

“Before proceeding in reference to the facts of this case, I will take the liberty of inviting your attention to certain rules of law which the Court will lay down for your guidance. I refer the Court to 1st Greenleaf on Evidence, Section 13:

“‘In civil cases, it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove; *but in criminal cases, it must exclude every other hypothesis but that of the guilt of the party.* In both cases a verdict may well be founded on circumstances alone; and these often lead to a conclusion far more satisfactory than direct evidence can produce.’

“In other words, the rule of law which governs you in this case, gentlemen, is simply this: Unless the circumstances proved exclude every other hypothesis than that of guilt, it is your bounden duty to acquit. This rule is well stated in Best on Presumptions, 282, which I will read:

“‘The evidence against the accused should be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offence imputed to him.’

“That is to say, if all the circumstances proved may be true, and yet the party be innocent, you must acquit. If the circumstances are consistent with guilt or innocence, then you must acquit. In illustration of these principles, I will read from Judge Edmonds's charge to the jury in the case of the People against Bodine (4th New York Legal Observer, page 93):

“‘Another rule is this: The evidence must exclude, to

a moral certainty, every other hypothesis but that of guilt. If you can reconcile the facts that are proven with the belief or supposition that the prisoner is innocent—that somebody else committed the guilty deed—then that hypothesis which the law requires does not exist in your minds. To illustrate this matter—for I find that these illustrations are in my own mind more effective than abstract propositions—like the instance stated by Counsel of the servant-girl indicted for the murder of her mistress. It was proved that she was alone in the house with the murdered woman—there were no signs about the house that it had been broken into—and from the fact that she had all the opportunities of committing the deed, it was concluded that she was the guilty person. One would have, indeed, supposed that every hypothesis but that of guilt was excluded. And yet, in that very case, there was another hypothesis that was nearer the truth even than that which the jury had formed. A man had entered the house by an open window, to which he obtained access by means of a plank thrown across from the opposite side of an alley, and after he had perpetrated the murder he removed every trace of his entrance. The conviction in that case was therefore held to be wrong, because there was another hypothesis which the evidence did not exclude.

“There is another thing to be taken into account, that circumstances are sometimes fabricated by innocent persons falsely accused. Take the case of the uncle ; he was heard chastising his niece severely ; she cried out, “You will kill me !” She was afterwards missing, nobody knew where she was ; the uncle was strongly interested in her death, because he would have inherited her estate ; he, alarmed at the circumstantial evidence against him, endeavored to save himself by dressing up another child and presenting it as his niece.

“That very fact was, as might have been expected, taken as strong evidence of his guilt. The man was convicted, and afterwards the child returned home, having run away from his severity. There can be little doubt that the

fabrication of evidence by him operated most strongly in the minds of the jury in convicting him. Fabrication is also sometimes resorted to by those really guilty, to ward off suspicion from themselves. Take the instance of the man found on the road with the stolen horse. He was found alone with the horse, and could not give any satisfactory account of the manner in which it came into his possession, and on that evidence he was convicted. But it turned out that the real thief, finding himself hotly pursued and in danger of being overtaken, encountered this man on the highway, and asked him to hold his horse while he stepped into the neighboring field, and thus escaped. The possibility of circumstances being thus fabricated, both of the innocent and the guilty, is therefore to be taken into consideration.

“Another rule is, that the supposition of guilt must flow naturally from all the facts, and be consistent with all of them. It must be no constrained result, and if any one of the facts is utterly inconsistent with the idea of guilt, it breaks the chain and bars the conclusion which might otherwise naturally flow from the other circumstances. As in the case of the servant-girl, accused of poisoning the family by food of which she partook as freely as any. The danger which she unnecessarily incurred was so inconsistent with the supposition of her guilt as of itself to be regarded as destructive of the conclusion which naturally flowed from other circumstances in the case.

“Another rule is, that in case of doubt, it is safest to acquit.’

“Gentlemen, I have quoted these rules of law, not because I believed any real necessity for so doing existed, but for the reason that the Court having not the power, as it has decided, to dismiss the case, it is incumbent on us to present it for your decision. We not only do not regret it, but we prefer that this course should be taken, although, as a matter of form, that motion was made to the Court. We prefer that you should dispose

of this case, because we wish not only that Mrs. Burdell should be acquitted, but that she should be *vindicated*.

"I shall first call your attention to the leading features of the case of the prosecution, relied on by the District Attorney in his opening, which he not only failed to prove, but which he has conclusively disproved.

"Here let me premise that, had he proved everything he promised, a very insufficient case of circumstantial testimony would have been made out. He told you, with a view to show that the murder was the work of a woman, that Dr. Burdell was stabbed in an inartificial and bungling manner, not as a man would be likely to do it, but after the manner of a woman bent upon fiendish revenge; and yet the very first witness he called was that venerable man, Dr. Francis, whose countenance beamed with intelligence, a man of high standing, as you know, in this community, a very patriarch in his profession; and he told you that, in his opinion, the person who inflicted those wounds '*had a good deal of anatomical knowledge*.'

"You heard the testimony of Dr. Uhl, another witness for the prosecution, and he testified that it was a *very difficult thing for an anatomist to strike as accurately as did the assassin of Dr. Burdell*. That such is the fact will be shown by a witness for the defence. Gentlemen, here ends that part of the District Attorney's case.

"The District Attorney next stated that the body of the murdered man was laid out upon the floor of his office by the assassin, that the body was not found in the position in which Dr. Burdell fell. That was another circumstance from which he deduced an inference of guilt against my client. What is his proof upon this point? His witnesses, Drs. Main and Uhl, tell you precisely the contrary, and that, in their judgment, *there was no evidence to show that the body had been at all disturbed*.

"Another circumstance which the District Attorney

paraded before you was this: He said the defendant appeared the next day with a fur cape, and that she did so to prevent the discovery of a red mark upon her neck, corresponding to the mark upon the neck of the deceased—the mark which he asserted had been given in the death struggle. You recollect the rhetoric with which he clothed this pretended circumstance. What is the proof upon this point? He asked his witness, Dr. Main, ‘Did you observe anything about her neck?’ and Dr. Main said, ‘No; there was nothing.’ Further than that, gentlemen, he told you that it was a very cold day; that a fur cape was a suitable article of clothing for that day; that there was nothing unusual in the manner of this lady in reference to that particular, at all events. And thus falls the next important circumstance alleged against this defendant.

“The District Attorney asserted that, on one occasion of great importance, the defendant directed her domestics to listen to altercations between herself and Dr. Burdell. I quote his language:

“‘She [defendant] with the sly cunning of her sex, took domestics into the room next door to his, and saying to them, “Now listen to the words that occupy the time between the doctor and myself.” Her spies, she thought. Ah! not so, thou artful woman—the spies of justice, who will be here to-day to tell what passed between you and that dead man—to tell what passed between them—words so loathing that even the domestics shrank in horror back to the kitchen, to remember well, for future use, what they had heard.’

“The extract lacks at least one element of beauty, and that is truth. The domestics, although boiling over with rage against the defendant, all testified that *no such facts existed*. Away, then, goes this circumstance.

“Another, and one of the most fearful circumstances

alleged against this defendant, was, that she obtruded herself into the presence of Dr. Thompson, made known her quarrels to him, and sought to enlist him in her battles against Dr. Burdell. You heard Dr. Thompson's evidence upon this subject; and he testified that exactly the contrary was true; that Dr. Burdell applied to him, and that Mrs. Burdell called and said that he had nothing to do with the matter. There was no reason why he should be drawn into it, and Dr. Thompson stated that he would have nothing to do with it, and the next day wrote a note to that effect.

"These are the leading circumstances on which the District Attorney thought to convict this woman of the crime of murder! You perceive that his own testimony takes away from the prosecution all the circumstances he alleged against her, or at least the chief circumstances. I only call your attention to these matters briefly. A most extraordinary spectacle! Strange, indeed, that in a case like this the District Attorney should make such labored efforts to illustrate the supposed infernal characteristics of the defendant. In regard to the female recruits furnished by history and the classics, for the special benefit of my learned friend, in this case, I should say the female fiends conjured up from their dread, sulphurous abode by the District Attorney, for the benevolent purpose of disciplining the nerves of an Oyer and Terminer jury—let me say, once for all, that while it would be an easy task, as an offset to this hideous group, to present before you a galaxy of female excellence, by calling your attention to the heroines illuminating history, and even to those whose Christian virtues grace the pages of Holy Writ, yet I shall make no attempt of this kind, even though my address to you should be barren of illustrations of my client's virtues. If the District Attorney thinks that his course, in this regard, has promoted the cause of justice, he is welcome

to any consolation he may have saved from the general wreck of his case.

“I ask again, gentlemen, why was it that such a savage attack was made upon this defenceless woman? There is only one principle upon which I can understand it. You heard the witness, Dr. Maguire, state the feeling that existed between the different members of the Burdell family. You heard enough from him to draw the inference that Dr. Burdell was generally on bad terms with his family; that he quarrelled and made up with them by turns, and that they possess one peculiarity, which is very apparent on this trial. The moment the lifeless remains of Harvey Burdell are consigned to the cold and silent tomb, and even before, commences the scramble for his property. We know with what avidity his heirs, his blood-relatives, have sought to snatch, and divide up among them, whatever property he left. We know how they have hunted this unfortunate woman; and I know, also, that the very Counsel of the members of that family who has appeared in the Surrogate's Court, in order, if possible, to make null and void her marriage with the deceased, so that they might get the property—that very Counsel, although a worthy man and an able lawyer, appears here to prosecute this woman to the death. Gentlemen, you all recollect, upon the Coroner's inquest, with what unmingled feelings of disgust was viewed the conduct of a certain lawyer who appeared there as Counsel for the blood-relatives of the deceased, and took part in that inquest. As you mingled with your acquaintances and the people in this city, and read the newspapers, you heard the universal condemnation of the course pursued by that man; you heard denounced the indelicacy, and indecency even, of his appearing as public prosecutor, and, at the same time, as Counsel for those pecuniarily interested in the death of my client. Gentlemen, I can understand why this trial

has been conducted in many respects as no other capital trial has been conducted, only upon the principle that it is the handiwork of the blood-relatives of Dr. Burdell, who have a large pecuniary interest in the death of the defendant. This interest can send Counsel here with instructions to work up the case, angle for testimony, apply thumb-screws to witnesses, torture them as if upon the rack, and do everything in human power to send the defendant to a felon's grave, in order to grasp the share of the property which must otherwise fall to her, as his lawful widow. I can understand upon no other principle why the prosecuting Counsel should travel beyond the record, and seek to be the channel of slanders, foul and hellish as ever fell from mortal lips—slanders, the truth or falsity of which is not to be tried in this court, because you are sitting only to try the indictment in this case. The District Attorney told you that this lady lived at 31 Bond Street, and, in effect, that she there kept a house of prostitution. He told you—and with burning eagerness he said it—that he would 'unroof that house.' He attempted to tell you that she had forsaken one paramour for another; and he went on in that strain, describing her conduct for years as that of the most infamous woman ever suffered to go at large in this community; and yet, gentlemen, he knew that would not be subject of evidence—he knew that no such proof could be introduced in this case—that, whether true or false, it was wholly foreign to the issues before you. Yet he availed himself of his position as Counsel to become the medium through which this diabolical calumny is to be disseminated throughout this community and scattered over the civilized world. I ask you, gentlemen, whether, as honest men, your very hearts did not sicken within you as you heard this infamous abuse heaped upon the defenceless head of the prisoner at the bar? Had my friend been an amateur, who loved to feast

upon horrors, to tear and mangle character for mere sport, he could not have pursued a more effectual course for the gratification of such an unholy taste. I should have thought that one consideration alone would have restrained him. Was it a pleasure to him to stand up here before you, and while her innocent daughters sat within a few feet of him—was it a pleasant task to travel beyond the record, and, in their presence and hearing, describe, in the terms he did, that mother, whose untiring and tender devotion to them has never slackened or diminished from their birth to the present hour? Was it a pleasure to him to take a course like that—an unnecessary, a vindictive, I had almost said a fiendish course? Gentlemen, I would have thought that one in whose veins flowed one drop of the milk of human kindness would have been restrained by humanity from unnecessary and uncalled-for abuse of the mother of those innocent daughters. Yet the gentleman could seek to influence your minds by such considerations. He seems to have thought them a suitable topic to descant upon, although not coming at all within the line of his duty. If he has gained anything by a course like that, I much mistake my reading of your countenances and my knowledge of human nature.

“I call upon you, gentlemen, by your verdict, to administer a fitting rebuke, not only to the District Attorney, but to the relatives of Dr. Burdell, who have been thus vigilant in the pursuit of an innocent woman. In the madness of their sacrilegious zeal they would illumine this holy temple with the flames of persecution—with a live coal from off the altar of justice they would light the widow's funeral pyre! Let them remember that at the threshold of your duties, as you put your lips to the holy evangelists, your oath—at the command of the widow's God—was registered in heaven by the recording angel. That oath is here the sword of justice—that

sword, through your instrumentality, is wielded by an omniscient hand. Hereafter, for a lifetime, let the solemn reality be engraven on their memory that, for her protection and their discomfiture,

“ ‘The brandished sword of God before them blazed
Fierce as a comet.’ ”

“ Next in order I shall discuss various circumstances sought to be used against my client by the District Attorney, which circumstances have for their foundation either his unsupported asseverations or his distorted and disjointed views of his own evidence.

“ He told you that Dr. Burdell lived without enemies and without reproach; that my client was his only enemy, and the only person that could by any possibility have had any motive or opportunity to commit that deed of horror. I would that we could have been spared any allusion to the fact, but the unauthorized statement of the District Attorney compelled us, as far as practicable, to go into the subject with the witness Maguire. Truth compels me to state that Harvey Burdell had many enemies; that he was never in a house where he did not have his quarrels. You recollect with what flourish of trumpets the District Attorney challenged the defence to show who, except the defendant had a motive for this murder—who but defendant could have done it—and, that I may not mistake his language, I will read from his speech :

“ ‘ I shall greatly mistake your comprehension if you do not arrive at the conclusion that it was done by some person in that house, and by her who had a motive, who expressed the motive by threats upon the very eve of its consummation, who had the ability to do it and to conceal it—and having spread these facts before you we shall call upon our learned friends upon the other side to say, *what of this motive? Who had a greater? What of this hatred*

and revenge and malice? *Where is there another who had greater ability to do and to conceal?* How could entrance have been obtained in that house? And if they shall fail in that, we shall claim hereafter, when the evidence which I have outlined shall be fitted together, to say that woman, whether she be called Emma Augusta Cunningham or Emma Augusta Burdell, whether she be the mistress or the wife, whether she had the simulated or the real marriage, that she—woman, though she is—was guilty of the crime.'

"And yet, gentlemen, but a few moments ago, when we proposed to take up the glove thrown down by the District Attorney—to meet him upon his own ground and with his own witnesses—what did he say in your hearing? He objected to the testimony, and said, 'This is a part of the tactics of the defence to put others on trial,' having previously told us, in effect, that if we did not do it our client should be hanged. He declared to you that great preparations were made for the murder by the defendant; that no murder was ever more deliberately planned. Where is the evidence of that? Among the circumstances to which he alluded he told you that the defendant required Hannah to go to bed early on the night in question. And here the most innocent act is tortured into evidence—is made to form one link in the chain of evidence—showing guilt; it is alleged that it never occurred before—a thing likely to happen any night when this servant was in the house. She says it only occurred that night, and yet Mary Donohue, when it is necessary to prove something criminal which happened a few days before, said that Mrs. Burdell requested her and Hannah to go to bed a week before this, and that was the only time when such a request was made; thus one witness contradicts another upon that point.

"Here is another circumstance: The District Attorney told you that there was a lock upon the door of 31

Bond Street—a mysterious lock—the like of which was never before made—that the mysterious lock was another link in that famous chain of evidence showing guilt—that my client had a key which opened that door, to which no other person had access. Yet, gentlemen, what becomes of the lock? The very maker of it shows you how it may be left so that the merest push against the door will open it; and Mr. Ullmann, this gentleman, as the District Attorney describes him, ‘honorable—against whom nothing can be said,’ tells you that a simple wire would be sufficient to open it. At first the lock was a little difficult, and a plain key would not open the door, but when altered, a penknife was sufficient—you could almost blow it open. Yet we can pardon the manufacturer of the lock for having a great affection for it, and thinking it a very superior article.

“Let me, in this connection, throw out a suggestion. Why did not the District Attorney examine the premises of parties who had keys to that house? Will he for one moment pretend that he is ignorant of the fact that there were other persons who had keys to that house? I do not desire to cast unnecessary suspicion upon any one. The District Attorney has failed to call these persons as witnesses. The testimony was before the Coroner, and if important for the defence, it shall be adduced here. I do not choose to mention the names of these parties at present. Why was it that no attention was directed towards any one save the defendant? Was it because the official, whose name has become a byword of reproach, knew not how to conduct an inquest? Was it because he, to save his own time, thought fit to charge the first man or woman he met with the crime and cease further inquiry? Let the prosecution answer.

“The District Attorney tells you that the defendant stole Dr. Burdell’s safe-key; and this is alleged to be

one of the circumstances pointing to her guilt. No statement more false was ever uttered by mortal man. The District Attorney asserts that this key was found in the defendant's possession. Not so. It was found in an open attic among a large quantity of papers, where it was probably thrown by the deceased, he equally with the defendant having access to that place. At any rate, there is not one particle of proof, or well-founded suspicion even, tending to show that the defendant ever had possession of that key. That Dr. Burdell lost his safe-key is not disputed; but where he lost it does not appear. Yet the District Attorney would intimate that with this lost key the defendant opened Burdell's safe and abstracted certain papers. And yet, as though by a peculiar Providence, it has been made to appear that Burdell obtained another key, which thereafter he always had in his possession down to the time of his death. The papers in question were lost in September, nearly three months after the *new* had supplied the place of the *lost* key. Mr. Herring, who made the safe, and who supplied the new key, you recollect, swore *that after the 28th of June the lost key would not open the safe.*

"The Counsel for the prosecution tells you that at 31 Bond Street, on the night of the homicide, there was a mysterious smell of burned garments—intending, doubtless, to insinuate that the perpetrator of the murder burned his or her bloody clothes, hoping thereby to consume all evidence of guilt. He introduced in evidence parties who, as they seem to think, experienced an unpleasant nasal sensation in reference to burned woollen. I will not take up time with this matter. Suffice it to say that others, who had better opportunities, smelled nothing of the kind. Mr. Ullmann did not, and there is nothing to show that his olfactories are defective in strength or keenness. You know very well, gentlemen, that had clothes been burned there on that memorable

night, the whole house would have been scented, even for a day or two afterwards.

“The District Attorney says that Dr. Samuel W. Parmly discovered a flickering light in the attic of that house a little before eleven o'clock. That light, he would have you believe, sends a few straggling rays across this case. Here my friend waxes joyful at the thought that perchance he has discovered a faint glimmering of guilt. It is a curious coincidence—and I hope my friend, Mr. Oliver, will forgive me for mentioning it—that, last evening, two gentlemen were passing the house of this self-same, veritable Dr. Parmly, and in his attic window they discovered just such a flickering light as he described in his evidence. I do not suppose he was engaged in consuming by fire bloody or bloodless garments. There was nothing connected with the appearance of that pretended light at 31 Bond Street at that time which would be calculated to impress upon his mind any incident of the kind, had it occurred. We say it did not occur; but Dr. Parmly, in spite of our remonstrance, would bring in here that pet dog of his—his own King Charles—and, with the fidelity which belongs to his race, he was made to speak, in corroboration of his master, with all the force of canine eloquence. The doctor says he never went to another house in pursuit of that dog, yet a gentleman residing next door told me it was no uncommon thing for that dog to come there, and for Dr. Parmly to call for him and find great difficulty in getting him away.

“I will not stop to discuss the peculiar mental composition of Dr. Parmly. I wish to say nothing unkind of him. The reason I put him the question I did upon that subject was because his relatives had advised me that he possessed an imagination of such peculiar power that, after the lapse of a very short time, it was impossible for him to separate what he had imagined from what

he had heard and seen. His own nephew, Dr. Ehrick Parmly, informed me—and, if necessary, he will be on the witness stand—that Dr. Samuel W. Parmly told him that he perceived the smell of burned woollen early in the evening—which was the time Burdell was assassinated, as he *then* thought—and it was with reference to this theory he fixed the time—and he failed to mention that he smelled anything of the kind afterwards. He tells you that the house was dark—that there was no light there except in the third-story window. The discrimination of a juror brought out the fact that Dr. Parmly paid no attention to the subject whatever; yet a moment before he stated that the only light in the house was the mysterious flickering one in the attic. This instance forms a small illustration of his peculiar mental condition. Even on this very night, so much were his nerves excited that when he saw two men in the street whose appearance had nothing brigandish, though they were not very elegantly dressed, he turned aside—he could not tell why, but he was confident he did not like their looks. When called upon to describe their movements, which struck him with such horror, all he could say was their walk alarmed him; and when asked what that was—whether it was fast—he did not know; whether it was slow, he did not know—he only knew that he was frightened.

“The District Attorney told you he would prove that these parties lived on very ill terms. He has brought up the servant-girls—those who have been severely disciplined, for these long months they have been in custody as witnesses. They, as you saw from their manner, were hostile to this defendant—one of them discharged by her for drunkenness, the other, perhaps a good cook, but, from causes unnecessary to mention, decidedly unfriendly to her—these parties, arrested as witnesses, taken into custody by the Coroner, controlled

by him, addressed in the most affectionate terms, made—aye, forced—to testify against their former employer—almost frightened out of their senses by their countryman, sitting in terrific majesty as Coroner—have only been able to testify to very few altercations, such as would be likely to occur between Dr. Burdell and any one who chanced to be in the house with him. Some of these occurrences never took place; others were grossly exaggerated by these witnesses.

“Bear in mind, gentlemen, they stated that, with the exception of the few altercations detailed by them, the defendant and deceased were always extremely friendly. Now what were these altercations? Hannah tells you that on one occasion defendant said to Dr. Burdell she would have *satisfaction*, or would be revenged. Officer Davis swore that he was called in on this occasion, and that the expression used was that she ‘would have satisfaction—would have his heart’s blood,’ or words to that effect. Now, gentlemen, with reference to what was this language used, if it were used at all? It appears in evidence already that two suits were commenced immediately after that conversation. This language, if ever used, most unquestionably had reference to the satisfaction to be had from these two suits. You heard that the charge made by Dr. Burdell was that this lady had stolen a promissory note belonging to him, and that, in consequence of that charge, he called in police officers. Now, gentlemen, I wish you knew all the facts in respect to that matter. Dr. Burdell, without a shadow of foundation—for sinister purposes of his own—did make a charge of that kind in presence of Police Officer Davis. I will tell you what that note was. A considerable time before this, Dr. Harvey Burdell and his brother William were on ill terms, and suits were pending between them. At the same time the wife of John Burdell—another brother—was seeking to pro-

cure a divorce, and William Burdell agreed to furnish the money for that purpose. He employed Mr. Edwards Pierrepont, a lawyer of this city, to prosecute that suit, and agreed to pay him. Mr. Pierrepont did prosecute it, employed associate Counsel, and paid them out of his own pocket; yet, when pay-day arrived, Mr. William Burdell declined to keep his word and foot the bill; upon which Mr. Pierrepont sued him, and obtained judgment. In the meantime some suits between Dr. and William Burdell had gone against the former, so that William Burdell held some judgments for costs against the doctor. These were in the hands of Mr. Pierrepont for collection. Dr. Burdell then asked Mr. Pierrepont to give him the judgment against William Burdell; and finally beleaguered him so that, in order to get rid of him, he told him if he would pay what he was legally bound to, he (Mr. P.) would make him a present of the judgment, on the express condition that he would never come near him again, and that he should never be called upon thereafter to speak to him. Under these circumstances Mr. Pierrepont, without any consideration passing at the time, gave him this judgment. Dr. Burdell, not willing to prosecute William in his own name, caused the judgment to be assigned to this defendant, and, as a matter of form, he took her note for the amount. Then, gentlemen, for reasons which, perhaps, it is not necessary to state, he did prefer the baseless, the false charge against her of stealing this note, perhaps for the very purpose of getting rid of her. She, at once indignant, as any high-minded woman would be, that such a charge was brought, spoke probably in terms of excitement. Could an innocent woman do less? She did immediately afterwards have her *satisfaction*. Burdell had agreed to marry her; he had introduced her into society as his intended wife. Their engagement was known among

their mutual acquaintances ; she was looked upon as the future Mrs. Harvey Burdell. When this infamous charge was made, her indignation was so far aroused that she invoked the aid of the law in her protection. She immediately commenced against him one action for slander and another for breach of promise of marriage in which he was held to bail in the large sum of twelve thousand dollars. You can imagine, gentlemen, what must have been the affidavits before the Judge to induce him to require bail in so large a sum. These cases were of a very grave character, and but for a subsequent settlement would have been vigorously prosecuted. I venture little when I say that no jury in either case would have failed to render a verdict for a large amount. I have no doubt, gentlemen, that had the defendant been disposed to prosecute these suits—had she been in pursuit of Dr. Burdell's property—she could have obtained verdicts which would have yielded her more money than her share of his property, now that she is his widow. Those suits were immediately settled. *But how settled?* Burdell then concluded to repair the grievous wrong he had done. The suits were discontinued upon the express understanding and agreement between themselves that within a certain number of days—six or ten, if I recollect aright—they should be married. *Within the time specified they were married, and thus were settled those two suits!*

“ Now, gentlemen, I ask you whether that kind of proof tends to show that the defendant perpetrated the murder? Cannot you understand that in the intercourse of a year or two parties may have their altercations, and bandy idle words and threats, and yet no serious meaning attach to them? I do not believe that this lady ever used the expression to which Officer Davis testified ; and, mark you, he is particular not to say that she said she would have Burdell's heart's blood, but that she said that,

'or words to that effect.' He does not pretend to recollect the words, but gives *his* idea of satisfaction. He does not know to what she alluded. It is natural that he, in view of subsequent events, should draw the conclusion that she said she would have his heart's blood. Yet, gentlemen, no such threat was ever uttered by her. The words she used were, in substance, that she would invoke the law in her aid; that she would have that satisfaction, which she subsequently did.

"But the Counsel for the prosecution talks about another difficulty; he even points to three or four altercations in the course of a year, to one of which Mary Donohue testifies. After she had been there about a week, she says, these parties had some conversation together; that Mrs. Burdell came out of the room where it occurred, and said to her that it was in relation to the woman * * * *. Now, were that true, would it prove anything? At this time defendant and deceased were married. As to the character of * * * * perhaps you have heard enough already. You have learned that she was accused of being the kept mistress of her own blood cousin. You have heard, and we can prove the fact, if the Court will let us, from Burdell's own papers, in his own handwriting—which papers are in the custody of the Public Administrator or the District Attorney—that he procured her divorce from her lawful husband, paid the expenses, and afterwards, as we are informed, kept her as his own mistress. Is there any blame imputable to this defendant? The 'head and front of *her* offending' is that she refused to permit her husband's mistress to reside with him—with herself—with her children. Yes, her nature, in all the majesty of womanhood, revolted at the thought of the exposure of her pure, innocent daughters to the contaminating society of * * * *. Had she done otherwise, what vials of wrath would have been poured upon her devoted head

by the District Attorney! To what torrents of invective she would have been subjected! Here, gentlemen, I beg you, forget not that after this * * * * *never did return to reside under the roof of Dr. Burdell*; yet she came there often to visit him—the defendant could not prevent this—for what purpose your discrimination will at once detect.

“A conversation at the breakfast-table, when the defendant was present, has been trumped up as evidence of hostile feeling on her part. It is said that Eckel—as innocent and harmless a man as ever appeared in human form—made a remark like this: ‘By jingo! I would like to be by when he is strung up, if I didn’t have to pull too hard at the rope.’ In the first place, the girls are mistaken about such a conversation having taken place. That some uncomplimentary allusion to Dr. Burdell, on the occasion in question, was made, is quite probable, as you will understand upon a narration of the circumstances. A few nights previous, or the night before, Dr. Burdell came home as late as one or two o’clock. He had his night-key, but could not get in; it was at the time the lock to the front door was out of order, and a night-key would not work, except with difficulty. He rang the bell with great violence, and awoke Hannah, who requested Snodgrass to go down and open the door, which he did, as a matter of kindness both to her and the doctor. He immediately began to abuse poor Snodgrass. According to the testimony we will produce, he said: ‘I’ll knock your brains out—I’ll dash your head in, G—d d—n you! Why is this door bolted? If ever it occurs again, I’ll do that.’ Snodgrass was somewhat surprised that Dr. Burdell, instead of thanking him for his kindly offices, should use such language. All must admit that Burdell treated Snodgrass very rudely on that occasion; yet Snodgrass never resented it, as far as I can learn. Some reference to this

was probably made next morning at the breakfast-table, when the opinion was expressed that Dr. Burdell was entirely wrong in using such violent language under such circumstances. That language is perhaps the best commentary that can be given of the utter meaninglessness of such threats. Do you suppose that Burdell, when he said he would knock Snodgrass's brains out, intended to put the threat in execution? Does a single day pass without your hearing such threats as 'I'll knock your head off!' 'I'll sweeten you, if you do such and such a thing!' 'I'll kill you!' or the like? Although such idle and meaningless threats are made every day, yet if Snodgrass had been waylaid and garroted, that threat would have been convincing proof, according to the theory of the prosecution, of the murderous design of Dr. Burdell?

"Here is a fact of great importance, which should be borne in view throughout this trial: notwithstanding Burdell was so irritable, violent, and possessed such an unhappy disposition, with a very few exceptions—mostly of a slight and trivial character—he and the defendant dwelt together in harmony. Does not this fact speak more loudly in her defence than do these frivolous quarrels against her? I will not dignify this branch of the case by descending further into details.

"The public prosecutor avers that the conduct of the defendant, after the death of Dr. Burdell, showed conscious guilt. A single expression of hers has been criticised with great severity; and the District Attorney has sought to torture it into an appearance of guilty knowledge respecting the assassination of the deceased. The District Attorney told you that the defendant remarked to Dr. Main, when he informed her that Dr. Burdell had burst a blood-vessel, that it was a relief to her to know that he had not been murdered. Why did she speak of murder, asks the gentleman. Had he for-

gotten that the servant-girl who first conveyed the information to her that Burdell was dead told her that he was murdered, as she feared? When Dr. Main came in she stated to him that, from what Hannah had said, she feared Burdell had been murdered. Why should the District Attorney thus seek to distort the evidence? Does he think that the ends of public justice will thereby be subserved? But, says the District Attorney, the defendant, on receipt of this information, did not rush down-stairs immediately. Had she then gone into the room which contained the corpse of her husband, my friend would have said that her conduct was hypocritical. Any emotion she might have exhibited in that trying moment, on viewing the mangled and bloody corpse of the object of her affections, the District Attorney would have stigmatized as 'acting.' It is a maxim of law that impossibilities shall be required of no one; therefore, we are under no obligation to please the District Attorney. But, whether he be pleased or displeased, I ask you if there was anything unnatural in her conduct? Remember, there were her daughters, the youngest at home, Miss Helen, having fainted; Miss Augusta, hysterical; herself laboring under violent hysterical excitement; people in great confusion rushing into the room;—would you expect that she, under such circumstances, could sit down and coolly calculate upon the best line of conduct to pursue with reference to the possible contingency of being accused of murder?

"The next charge is that she refused to testify before the Coroner, that she would not even come into the room containing him and his jury, without the advice of Counsel. I had not seen her at that time. You must remember that she had been already arrested. Yes, in defiance of law, she was taken into custody by the Coroner about the middle of the afternoon of Saturday. She, knowing that her marriage with the deceased had not been pub-

lished to the world—for it was not to be made known until the following June, when Burdell was to give up his business and take her to Europe—she, knowing this, and especially in view of her arrest, might, without impropriety, desire to consult Counsel. No evidence of guilt could fairly be deducible from such a circumstance. You must recollect that the Coroner's treatment of her and her family, which has fixed such a lasting disgrace on the very name of Coroner, had already commenced. Had she, under these circumstances, refused to testify until she had advised with Counsel, her conduct would have been quite excusable. Yet such was not the fact; conscious of her innocence, she shrunk not from encountering, face to face, even that Coroner. She went immediately to the room where he and his jury were stationed and gave her testimony. It was marked with candor and fairness; and, if there be anything in it which conflicts with the testimony of Hannah Conlan or Mary Donohue, I should be sorry to see any juror take the testimony of either, or both, in preference to that of this lady.

“But, says the District Attorney, she *afterwards* refused to testify. By this time the course of the Coroner in regard to this defendant was pretty well developed. He had devoted his untiring and sleepless energies to the task of fastening guilt, or at all events suspicion, upon the prisoner at the bar. He had converted 31 Bond Street into a prison for her and her family. He refused to accord to her the privilege ordinarily extended to the vilest of criminals—to wit, the right of seeing and consulting with friends and Counsel. With such a high hand did he carry on this crusade against the rights of my client that it was necessary to apply for relief to a Judge of the Court of Common Pleas of this city. With a view to enforce my rights, with a view to enforce the rights of the Bar, with a view to protect the rights of this lady, I was compelled to apply to Judge Brady for

a writ of *habeas corpus* to bring her down to the City Hall in order to obtain an interview with her. I then demanded to know whether the Coroner held my client as a witness or as a party. Although at first, with characteristic zeal, the Coroner stated, in his return to the writ, he held her in *both* capacities—as party and witness—yet upon being compelled by his Honor the Judge to elect, he finally resolved to hold her as a party. I previously stated in open Court that if he held her only as a witness, he might take her testimony; he might examine her as long as he pleased; but that if he held her as a party, his enthusiastic eagerness, his excruciating anxiety to use her as a witness were doomed to disappointment. Our law forbids, humanity forbids, common decency abhors the spectacle of the examination of a party in a criminal case as a witness against himself or herself. Yet in this particular case, believing fully, as I did, in the innocence of my client, knowing she would not object to being examined as a witness before any fair magistrate—she even desired to be examined before the Coroner—if there was any fault in her not being examined before him, it was *mine*, and *mine entirely*, because, notwithstanding her wish, I told her that I would not, so long as I was her Counsel, allow her to be examined before that man; yet, as I said, so entirely was I satisfied of her innocence, and that she had nothing to fear and everything to gain by such a course, that I stated to the District Attorney if he would take her before any fair magistrate—and he had a perfect right to do so—I would interpose no obstacle to the taking of her testimony. I even told my learned friend that he was at liberty to call her before the Grand Jury, and I would advise her to answer any and every question that he might put to her. I thus freely tendered her as a witness. My objections in her particular case were personal to that Coroner.

"There is another portion of the District Attorney's address I must not forget. His whole speech excited no little surprise on our part, but we were taken by storm when he intimated that he had within his grasp *almost* an eye-witness of the murder. He said:

" 'By every hypothesis, it was the hand of some one who knew that house—who had time to stay; *and in that room back there sat a silent watcher, a sick man, and saw the form of some one in there*—a man whose evidence has never before been given to the public, and though it forms in itself the essence of a very small circumstance, it shows conclusively to the mind of the prosecution that there was no haste about that thing; that it was as deliberately followed up as it had been deliberately planned, and promptly and efficiently executed.'

"Where is that 'silent watcher'? We watched in vain for his appearance on the witness stand. Our sympathies are warm and generous towards that 'sick man.' Where is the evidence that 'he saw the form of some one in there'? Whose form did he behold?

"But enough of the unredeemed promises of the District Attorney! His alleged evidence against the accused vanishes at the touch into thin air. The chain of circumstantial evidence he sought to forge with which to bind my client to the scaffold becomes but a rope of sand.

"I shall now present to you some further considerations, growing out of the evidence of the prosecution, establishing the innocence of the defendant.

"The District Attorney told you that whoever murdered Dr. Burdell was covered with blood. I will quote my learned friend's language:

" 'Whoever did that deed, was, in all probability, covered from head to foot with blood; blood upon the dead walls; blood upon the dead doors; blood upon the dead furniture

—no figure of roinance when the advocates speak about a pool of blood around the weltering dead corpse—little marks of blood upon the carpet, drops that had fallen from something—from the bloody dagger, from the bloody sleeve—from the bloody form.’

“Do you suppose that whoever perpetrated that deed could have done it without thus becoming covered with blood? Would not the bloody finger-prints—the bloody marks—have been made wherever that person went? Here, remember, that instant possession of the house 31 Bond Street was taken by the Coroner and the police; that the whole house was searched—searched from cellar to garret—out-houses searched—even the premises of Eckel were searched. All in that house—all in the employ of defendant—all who were acquainted with her—nearly all who had ever seen or heard her—as far as the Coroner could ascertain—were called as witnesses, and an examination, extending over two weeks’ time, was had in respect to the matter. Blood was found up-stairs; and the theory was, that the assassin had taken that direction. There was blood upon the clothes up there; and that was subjected to careful analysis. It was demonstrated that it was menstrual—not venous blood. And that theory was overturned. The dresses—I ask your special attention to this—the dresses of all in that house—of the mother and daughters—all their dresses were examined by chemists. The police also examined them. Every little spot was subjected to chemical analysis, with a view to discover blood. Every pear-juice stain, even upon the dresses of the children, was subjected to a chemical analysis. Yet the result of this police search—this scientific search—for blood, revealed nothing adverse to the inmates of that house. This fact should have spoken trumpet-tongued in their defence. Had they, or any of them, participated in that terrible crime, could they so speed-

ily, under such circumstances, have removed entirely all bloody trace of their guilt? The idea is preposterous.

"The District Attorney stated, in his opening, that the homicide was perpetrated by a *left-handed woman*. His language was (in speaking of the manner in which the murder was accomplished):

"'But whether struck here or there, *this one damning fact will come out, that whoever struck that blow was probably a left-handed woman; and she, left-handed, carefully watched in the prison to see it, and the domestics of the family swearing so.*'

"Where is this vaunted evidence? Not a scintilla of proof has been introduced to show that the defendant is left-handed. *The fact is otherwise.*

"The District Attorney tells you that when the assassin was plying the murderous dagger, Dr. Burdell fought with the 'desperation of a whole army!' Do you suppose that woman [pointing to the defendant], whose arms and hands are, to no inconsiderable extent, enfeebled by rheumatism—a woman of very little physical power—possessing not a fourth—scarcely a tenth—of the muscular power of Burdell—do you suppose that she, alone, could have grappled with him, or that she, in company with others, could have participated in that foul deed, and leave no trace of crime? Impossible! Absolutely impossible!

"Here, bear in mind, some of the District Attorney's medical witnesses state that the fatal blow, which severed the carotid artery, was struck from behind. Suppose it was! The direction of the stream of blood which spurted forth when that blow came, as now appears upon the wall, shows beyond all question that Dr. Burdell stood erect. The blow which severed the carotid artery went *downward*; and it is just as plain as the sun at noonday that if that blow were given as the

prosecution's witnesses say it was, it was inflicted by a strong, muscular man—a man much taller than Harvey Burdell. The fact is susceptible of demonstration that, from the position of the parties, Burdell stood erect; and as the jet of blood corresponding with his height shows, this blow was inflicted *downward*. You can see at once that it must have been given by a man much taller than Harvey Burdell, and by a man of great muscular power. It was a blow which required great force in order to do the execution it did. Further than that, gentlemen—and I ask you to give to this your careful consideration—that blow, in all human probability, was given by one possessing *anatomical skill*. The physicians tell you that it would be a difficult matter to plant blows as effectually as did the assassin on this occasion; for you will recollect that not only was the carotid artery severed, but that a stab through the heart was also given. There is scarcely a surgeon in town who, in a struggle of this kind, could strike at vital parts with such deadly effect. A tall man must have done this deed—a man possessed of medical skill. Who is that man? We are not public prosecutors. All information within our reach has been furnished the District Attorney. All that we know, he knows.

“Gentlemen, it appeared before the Coroner's Jury that various other parties saw Dr. Burdell on the day of this murder; that among them there was but one individual who had an appointment to meet him that evening, and that that individual saw him late in the afternoon. He was the only living man who had a business appointment with Dr. Burdell, as far as the testimony before the Coroner showed, on the evening it is alleged he was killed. Why has not that man been called? I read from my learned friend's address to you: ‘I pray your attention to that—who had watched him on Friday, who had watched his conversation with *Dr. Cox*—

who will be upon the stand—and with Dr. Blaisdell—who will also be upon the stand—who was watching his coming? Why have not both of these witnesses been produced? We had hoped to see them upon the witness stand, as we had certain questions—not uninteresting—to put them.

“But, says the District Attorney, prove who had a greater motive to commit this crime. If you do not, the rules of law should be *reversed*, and this defendant should be found guilty. The rules of law *reversed*! It is a strange spectacle to behold the public prosecutor—a sworn officer of the law—call upon you to reverse the rules of law! which is, in effect, asking you to violate the law. Hang the defendant, unless she will prove who is guilty! If she be innocent, how can she tell who is guilty?

“So much for the testimony of the prosecution. The evidence of the District Attorney, which he thought would form a rock on which my client was destined to founder, has proved to her a Gibraltar of defence. Even in his labored attempt to fasten suspicion upon her, ‘his *reasons* are as two grains of wheat hid in two bushels of chaff; you shall seek all day ere you find them; and when you have them, they are not worth the search.’

“I shall now call your attention to a few additional facts connected with the testimony of the defence, establishing, affirmatively, the innocence of the defendant—demonstrating the impossibility of her guilt.

“We have determined to go into a defence, not because the slightest necessity of so doing has been imposed upon us by the testimony of the prosecution, but for the same reason I was willing to tender to my learned friend my client as a witness, I am willing, ready—aye, anxious—to go into a defence.

“Our evidence will show that immediately after the death of Burdell no wounds were upon the person of the

prisoner at the bar. I have already alluded to the assertion of the District Attorney, that a mark was found upon her neck, as though she had been engaged in a death grapple. Had she been so engaged, not a few wounds would have been upon her person, all speaking in unmistakable language of her participation in that dark and foul deed. Were any such wounds upon her person? Was there anything to indicate that she had taken part in that horrible crime? That matter was investigated. Her person was examined. In defiance of law—in defiance of humanity—in defiance of common decency—*her person was examined!* Yes, there were men, under the control of the Coroner, at 31 Bond Street, who perpetrated this foul outrage! Suspected as she was, had the examination been conducted with decency, and by *her own sex*, we never would have expressed the first word of complaint. But the Coroner took it into his wise head to act as though he thought her guilty, and that an examination of her person would show wounds upon it, and thus demonstrate her connection with the death of Burdell. Hence, that examination was ordered; and although the result is such that we are bound to introduce it here, as showing her innocence, yet the manner in which that examination was performed—by *men*, * * * a policeman and physician being present—was such as to strike you with unutterable disgust and loathing. You can understand me, gentlemen, when I say that this woman has been ruthlessly deprived of her rights. It was not enough that she should be locked up as a prisoner in her own home, afflicted as she was, the second time a widow, her husband having met his death by violence, which plunged her into the deepest abyss of grief; all that was not enough; but a fiend—to use the classic language of the District Attorney—a very fiend, who called himself a Coroner, must take it upon himself to see that her per-

son was stripped, as naked as she came into the world, and examined, with a view to discover marks of violence! Yes, to his everlasting condemnation be it spoken that he ordered and allowed this to be done by *men*! Yes—a mother of five children—her grown-up daughters ready to be married—was ordered and compelled to expose her person! I need not inform you that the Coroner had no legal nor moral right thus to proceed; although (I repeat) she would have consented to the examination of her person by *women*. Had he sent for the matron of the City Prison, or *any* respectable woman, to perform that examination, no complaint would have been made.

“Gentlemen, if ever there was a woman whose feelings had been outraged, and who was entitled to sympathy at the hands of a jury, it is this woman, now a prisoner at your bar. I know not why the District Attorney should have said that she was disentitled to all sympathy at your hands. He called her a ‘tigress.’ Had she borrowed the strength of a tigress and clutched by the throat the perpetrators of this outrage—throttled them—till life left their bodies, she would have been acquitted of all blame at the hands of a humane and indignant jury. Let them rejoice that she, armed by the law of nature, by the law of the land, with the right of self-defence, with the right of defence of her person, did not shoot them down. In this matter the Coroner has done enough to secure for himself an immortality of infamy—enough to send his name down to the latest posterity freighted with loathings and execrations.

“Yet, gentlemen, there was no wound—no mark—no scratch—found upon her person. That fact alone would be sufficient to demonstrate her innocence. The District Attorney has charged that *she* did the deed, that she participated bodily, and that is the issue you are to try under this indictment. He cannot, in any point

of view, ask a conviction, unless you find that she was present, aiding and abetting in the homicide, and in person took part in the encounter. This branch of the evidence alone establishes the proposition that the prosecution have not only failed in proving anything necessary to make out their case, but have proved a complete defence.

"We shall introduce another item of evidence, which, in the minds of the whole community, will remove the only ground of suspicion that ever existed against this woman. When this community was first startled with the news of the murder, the almost universal inquiry made was: How could such a homicide be committed in the house in question without the knowledge of its inmates? How could it be that they heard no noise? I will tell you. The construction of that house is such that, with carpets down and doors shut, it is an utter impossibility, in the room occupied by Mrs. Burdell and her daughters, to hear a scream, certainly a much less noise, such as Dr. Burdell probably made. The walls and floors are very thick; we will give you the dimensions. I and my associate, in company with Drs. Uhl, Dwinelle, Roberts, and Mr. Abbott, occupied two hours in making experiments at 31 Bond Street, with a view to ascertain whether sounds made in any one room could be heard in any other room on the floor above. One portion of our force was stationed in the room occupied by defendant and her daughters, while the others were in the room where Dr. Burdell was killed. Those in the latter room fell upon the floor with the greatest possible violence, at the same time shouting 'Murder!' and 'Halloo!' as vociferously as human lungs would permit. Not a sound could be heard in the former room; not a sound was heard, with the exception of a faint sound of 'Halloo,' or, rather, a very faint sound of the 'o' in that word. It was so faint that in Mrs. Burdell's room it

was not possible to tell whence that sound proceeded. Here, then, you have it demonstrated that when Dr. Burdell was screaming or shrieking, if he did scream or shriek, the sound could not, by human possibility, be heard in Mrs. Burdell's room, unless by some one on the watch, with the door open, listening.

"During the continuance of these experiments I suppose we shouted 'Murder!' at least fifty times. We cried aloud; we shrieked for help; we begged for succor; we sent up loud, long, and piteous wails of distress, enough to melt the hearts of savages; yet no one came to our relief; people were passing to and fro in the street continually; the adjacent houses were lit up, filled with occupants. Although we were thus turbulent, created more noise than would have been occasioned by scores of murders, yet the neighbors, the police, the passers-by, unconscious of our perils, left us to perish, to die all sorts of horrible deaths! You recollect that the District Attorney stated to you that the inmates of that house, and especially the occupants of Mrs. Burdell's room, must have heard the noise in Dr. Burdell's room at the time he was killed. You can now understand that this was impossible. *This must forever remove from the case the only ground of suspicion which ever attached to it in the public mind.*

"We shall place on the witness stand the inmates of the house 31 Bond Street, and shall prove by them the impossibility of defendant's guilt. Here let me ask, in all earnestness and sincerity, why the District Attorney has failed to call every *material* witness examined before the Coroner? He has left out of his case nearly the entire body of the evidence introduced before that unique and redoubtable functionary. Snodgrass was examined several times, and at great length. The daughters of this lady—aye, and her little sons, nine and ten years of age—were all made to testify before the Coro-

ner—were all called to the stand as witnesses against their mother. They testified under circumstances calculated to make the stoutest heart quail, calculated almost to disturb even a soldier's nerves. The daughters were subjected to an examination, or rather an adroit and subtle cross-examination, whose merciless severity was almost without parallel in the annals of criminal jurisprudence. All this was done for the sole purpose of extracting from their lips evidence of their mother's guilt. Those little boys were forced to pass through the same ordeal. Remember that each was examined in the absence of all the others, in a room densely packed with spectators. I recollect well, in reading that evidence, the peculiar nature of the questions put to those artless boys. These are fair specimens :

“‘My little son, what time was it when you heard the noise last night?’

“‘What time was it when you heard the struggle?’

“‘What did your little brother say to you about the noise he heard, when he woke up?’

“In that artful way it was sought so to entangle them with leading and complicated questions as to extort from them what *was not true*. However, they, unattended by their mother, unattended by their sisters, unattended by Counsel, with no familiar faces about them, fronting a gaping crowd, answered every question put to them, in the simplicity of childhood. It was apparent to all that every word which fell from their lips was truth itself. Yes, gentlemen, those noble little boys could not be terrified, even by the Coroner's stentorian voice, in which he launched forth huge interrogatories, into telling aught but the truth.

“I ask again, and you will ponder this well, why has the District Attorney, with one exception, left off the stand every person who was in that house on the night

of the homicide? He required Snodgrass to give bail in the sum of two thousand five hundred dollars for his appearance on this trial as a witness for the prosecution. Why has not the District Attorney called him? Will not the truth answer his purpose? Does he suppose that all the inmates of that house were privy to the murder? Can such an astounding and horrible thought find a resting-place in his mind? I cannot, I will not, impute to him so monstrous, such a diabolical absurdity.

"Gentlemen, you are aware that the theory presented during this trial is, that Dr. Burdell was killed after ten or eleven o'clock at night. We shall place before you, as witnesses, the children of this lady, as well as Snodgrass. We will prove her whereabouts during that day and evening. We will prove to you that, in company with her daughters, Augusta and Helen, she retired to bed that evening long before the murder was committed; that all three slept in one bed, the mother sleeping between the other two; that the mother, after so retiring, did not leave her bed until after sunrise the next morning. Her whereabouts, every moment of the time during which, it is alleged, the homicide was committed, will be shown by evidence, as credible, as pure, as truthful as was ever given in a court of justice. This will establish the absolute impossibility of the defendant's participation in the crime with which she stands charged. I will not stop here to allude to the charge against the eldest daughter of my client, sought to be conveyed by the District Attorney in his opening, by a vague and shadowy insinuation. I will not so far insult your understanding as to take a course implying that I suppose you consider any answer to that attack necessary.

"I have thus gone over nearly all I intend to say in relation to this case. I have felt it my duty to discuss its merits as thoroughly as if I considered my client in real danger. You will appreciate my position when I

say I have endeavored to discharge my *whole* duty; whether with benefit to my client is for you to determine. I trust you will believe I have done something towards carrying out the intention I expressed at the outset of my observations, that Mrs. Burdell should not only be acquitted, but *vindicated*.

“This is not merely a struggle for liberty—not merely a struggle for life—we battle for *character*, without which life is but a withering curse; life without character is as the body after the soul has fled.

“ ‘It is as if the dead could feel
The icy worm around them steal,
And shudder, as the reptiles creep
To revel o’er their rotting sleep,
Without the power to scare away
The cold consumers of their clay.’

“The future of Emma Augusta Burdell not alone hangs upon your decision: five children—as bright jewels as ever studded the diadem of woman’s pride—must share her glory or infamy. Your verdict must illumine their future with the serene and hallowed light of innocence, or shroud it in darkness darker than death. Must her little sons receive nought but a legacy of shame? Must it be told them, when they grow to manhood, that their mother was deluged in crime, that their sisters were monsters of iniquity, that what should have been the temple of domestic purity was but the charnel-house of moral death? Ah! better for those sisters that the stiletto, bathed in their heart’s-blood, should record the death of the body than that your decision should appear as a moral guillotine to sever the vital principle of integrity from their being—aye, a hundred-fold better, than that your verdict should be to them an index-finger upon the guide-board of life’s pathway, pointing to the grave of all their hopes!

“When listening to the eloquence of the District At-

torney, to his reference to ancient and modern classics, to ancient and modern history, to the sketches he drew of desperate women, I remembered that in those times there existed a crime which sapped the very foundation of law—a crime which festered and gangrened in the God-defying action of those into whose hands, for a time, was committed the administration of public justice—a crime so baleful in its consequences, so towering in guilt, as to almost bury in insignificance every other offence—that crime was *judicial murder*! It existed when juries convicted of capital offences in violation of law, and in defiance of evidence. Thank God, those days have passed! I have no fear that you will attempt the restoration of that crime, notwithstanding the manner in which the District Attorney has conducted the prosecution.

“Gentlemen, I know the defendant has nothing to fear from you, the chosen ministers of the law, armed as you are with the sword of justice to prevent the success of perjury and the execution of designs festering in malignant hate. You will rejoice that duty does not require—but forbids—you to throw over my client, her family—one and all—the mantle of infamy whose black and cumbrous folds would envelop and entangle them in all the varied windings of the labyrinth of life. You will rejoice in the opportunity to vindicate the widow and the fatherless—to show that in a court of justice, come what may, their rights shall be protected. When the time shall arrive—as it will speedily—for you forever to end this case, I venture to say the pleasantest duty which ever devolved upon you will be to pronounce a fearless and truthful verdict of ‘Not Guilty.’”

CHAPTER XIII

CUNNINGHAM-BURDELL MURDER CASE (CONTINUED)

Witnesses who Testified for the Defence.—Last Day of the Trial.—
Addresses to the Jury by Mr. Dean and Mr. Clinton on the Part
of the Defence, and by the District Attorney and Attorney-General
on the Part of the Prosecution.

On behalf of the defence, the following witnesses were called and examined: Rev. Luther F. Beecher, William A. Beecher, Dr. John F. Carnochan, Dr. W. B. Roberts, George D. Cunningham, Dr. Ehrick Parmly, Rev. Dr. William D. Snodgrass, Dr. Samuel H. Catlin, Edwards Pierrepont, George Vail Snodgrass, Miss Hester Van Ness, Dr. Daniel D. Smith, Fernando O. Smith, Mrs. Catherine Dennison, Herbert W. Treadwell, Helen Cunningham, John Smith, Margaret Augusta Cunningham, John Perkins, and Henry S. Smith.

On Friday evening, the 8th of May, the defence closed their evidence. No rebutting testimony was offered on the part of the prosecution. The sessions of the Court from the commencement of the trial had been each day prolonged from early in the morning until late in the evening. Although the testimony before the Coroner (where the defence was not heard at all) occupied thirteen days, yet on the trial only four days were required for the direct and cross-examination of all the witnesses. The Court, before adjourning until the next morning, announced that Counsel would be allowed four hours on each side for addressing the jury. If two Counsel

on each side addressed the jury, they could divide the time between them to suit themselves.

Mrs. Cunningham bore the strain of the trial well, and, from the beginning, never faltered in the belief that she would be triumphantly acquitted. So absolutely confident was she that, early the next morning, before she left the Tombs for the Court, she sent home to 31 Bond Street all the clothes and other things that had been brought to her for her comfort and convenience during her imprisonment, which had now lasted nearly three months. That morning she bade adieu to the Tombs, never, as she believed, to enter again within its precincts.

The following is an account of the proceedings of the last day of the trial, published in the *New York Daily Times*, May 11, 1857:

“The trial of Mrs. Emma Augusta Cunningham, otherwise called Burdell, was continued to-day. * * * The evidence having been closed on Friday night, and there being considerable curiosity to hear what course the District Attorney would pursue in his closing speech, there was not an inch of standing-room unoccupied. Four hours were assigned to either side to close their case. Counsel arranged to occupy two hours each. When the roll of the jurors had been called, the District Attorney referred to the request of the defence last evening that the prosecution should furnish them with the principal points of law on which he would ask a conviction of the prisoner. At that time he was not prepared to give them in regular form. This morning, however, he was, and Mr. Edwards would present them.

“POINTS ON WHICH THE PROSECUTION RESTED

“Mr. Edwards then read as follows:

“‘Many of the most important legal principles in criminal law which attach to a conclusion of guilt lay hold of the prisoner, Emma Augusta Cunningham.

“1. Crime may be committed where resentment is dissembled, while legal presumptions are powerful against an accused party where revengeful impulse is so ardent and active as to be exhibited in expressions. These partake of the state of mind and heart, and show motive from its source, and the law inquires for motive. (*People v. Henrietta Robinson*, 1 *Parker's Criminal Cases*, 649; *People v. Lake*, 1 *Parker's Criminal Cases*, 502.)

“2. A declaration of criminal intention goes very far in law towards a conviction, when it is followed by the fact of a violent death; and it becomes all-controlling when coupled with the fact that such violent death clearly occurs within the very home or house of the accused.

“Such declaration shows an ill-will, which the person uttering it is prepared, on a fitting occasion, and with secreted means, to carry into effect.

“3. Positive threats come even nearer conviction. Here desire and purpose legally assume their strongest form. (*Harris's Case*, 12 *State Trials*, 841-846.)

“4. Preparation for the commission of crime, whether auxiliary or otherwise, is even more powerful against a prisoner than words, for it amounts to intention expressed by acts. (*Earl Ferris's Case*, 19 *State Trials*, 904. A female servant, living with the prisoner, was sent out to walk with the children. In the present case the servants were sent off to bed.) In *Harris's case* (2d *Chandler, Am. Crim. Trials*, 353, 386) a deliberate attempt to create *alibi* evidently in advance of a crime was made.

“5. Opportunity and facilities include the possession of means, and form together positive criminative circumstances. Here it grew out of existing circumstances and relations. The relation of mistress and keeper multiplied almost indefinitely the opportunities and facilities.

“6. A loaded revolver or pistol found in the possession of a woman, in a peaceful neighborhood, who has thus used threats against a man found murdered in her house under circumstances like the present, raises a presumption against her, although he may have been killed by another weapon

not found (*Commonwealth v. Williams*, 2d Cushing, 582); especially when it clearly appears that such pistol was once his property, and there was time to dispose of the killing weapon.

“7. Circumstances in this case attach against the prisoner as well where these circumstances preceded as where they followed the crime.

“8. Here was proximity of the accused to the scene of the crime at the very time of its committal, made more near by a false key and lewd intercourse. This raises a legal presumption of participation in the criminal act, especially when coupled with threats.

“9. Guilty actions are so often attached to a secret manner of committal of crime that the law is satisfied with a conclusion drawn from evidence of mere circumstances, and from these alone, and without a single requirement of direct testimony save the production of the dead body. The commission of the act charged may be fairly presumed by the jury. (*Russell on Crimes*, 726.)

“And a conclusion of guilt may depend upon a number of circumstantial links which alone may be weak, but taken together are strong and able to conclude. (*McCann v. The States*, 13 Swedes and M., 471.)

“10. Where medical evidence shows that a more mortal wound might have been given than any of those which were inflicted in this case—namely, where the spinal cord commences—the idea of a wounding by a person possessed of anatomical knowledge is much weakened; while the facts of random and helter-skelter cuts and *several* mortal wounds are against the idea that the deed was done by one who was schooled in or studied surgery or anatomy, as such a one would not have done the former nor found the latter necessary.

“Jurors are to take *post-mortem* experiments with great caution and as possessing no weight. Thus experiments by blows on a dead body lead to no just conclusions, as common-sense tells us that there is a total want of resistance and an entire relaxation of muscles, while the living

man is made up of active substance and principles of resistance.

“11. When a palpable murder has been committed, legal circumstances may attach and be sufficient to convict without the necessity of finding the weapon which caused it. The law may require a dead body to be produced before a conviction for murder can attach ; but, being produced, and the violence apparent, it does not insist on a sight of the weapon. It can deal with the accused without it.’

“REMARKS OF JUDGE DEAN

“Mr. Dean addressed the jury first for the prisoner. After a brief reference to the above points, he, before attempting to show any inapplicability or inefficiency, announced that the defence would expect from the jury a verdict declaring the innocence of the prisoner before they left their seats. In presenting their case to the jury, he did not intend any reference to that brutal man who conducted the inquest on the body of Dr. Burdell ; but, nevertheless, he would ask the prosecution to state why it was that his client had been charged with such a crime any more than any other of the million who live within the sound of the fire-bell on the City Hall. They were not before the Court to prove who committed the deed. They were not there to show that it was some father determined to wash out his daughter’s disgrace in the blood of her injurer, nor to show that it was committed by the hand of an injured husband seeking vengeance upon the violator of his bed. Neither were they there to show that it was done by one who imagined he had pecuniary advantage to gain by the commission of the deed. They were there to prove that the accused did not commit the murder. They had accepted the gauntlet thrown down by the prosecution, and they *had* proved her not guilty. And here, lest he might forget it in another connection, he would ask why was the extraordinary omission on the part of the prosecution to show at what time Dr. Burdell entered No. 31 Bond Street the night of the murder, and where he was prior to that time. The prosecution had not attempted

to prove that, but, on the contrary, and reversing the long-established rule in such cases, they had required the defence to prove not only innocence, but where the accused was during every moment of that day and fatal night. They had shown that.

“The prosecution had attempted to show that the accused was the mistress of Dr. Burdell, and that she had slain him because he refused to make her his wife. That charge had been amply refuted. It had been shown by witnesses on whom the prosecution had not attempted to cast the faintest shadow of suspicion. In attempting to establish the charge, they had brought in a servant, whose character was sufficiently clear before the jury, to swear that she informed the accused that the doctor was about to lease his house, and that the accused said he might not live to accomplish it—testimony which, if true, could not have escaped the memory of that servant when before the Coroner’s Jury, but which, singularly enough, she had not remembered until long afterwards, and then only after having been conversed with by many. But what the prosecution had attempted to prove was by no means so extraordinary under the circumstances as what they had not attempted to prove. It had been shown that during the afternoon * * * * had been in the doctor’s room—* * * *, a woman known to have been his mistress, a woman, the accused had declared, she would not suffer to live again in the house with her family. That woman was there, and in the doctor’s room; and why, he would ask, had she not been called to testify when she left there? The time when the doctor must make his marriage known was drawing near. Had the doctor called this former mistress—this * * * *—to his room for the purpose of telling her of his marriage, and that she must be cast off? Was that the case? Was she thus made the jealous woman? and was jealous woman’s fiendish hate thus excited in her breast? She had not been called, that the truth might have been known. She was known to have been in his room. It was not known when she left it, although she was at hand, and might have been called. She knew Blais-

dell. It had been known that Blaisdell was there during the afternoon, or was to have been there that evening. Should not this * * * * have been called to show whether he had been there while she was present ; and, if so, should not both have been called, to show which was there last. And again, it was claimed that the doctor had gone out that evening. Where did he go ? How long did he remain ? Whom was he with and with whom did he converse during his absence ? The doctor was a man well known in the city. Some one must have seen and spoken with him. Why had such person or persons not been called ? Nothing of the kind had been done. The prosecution had *charged* the accused with having committed the murder, and that was all they had done. It was necessary to have shown at what hour Dr. Burdell was murdered. If Dr. Burdell had partaken of his dinner that day, an analysis of the contents of his stomach would have shown it. If he had partaken of his supper, an analysis of the contents of his stomach would have discovered that important fact. But no witness had been called to that point ; and there was no evidence that such an analysis had been made ; although it was clear that Dr. Knight, another of the sons-in-law of Coroner Connery, had taken out the stomach before Dr. Woodward, who conducted the examination of the body, arrived. So with the wounds. There has been no sufficient dissection of the parts to ascertain their depth and direction. In fact, there had been no evidence produced by the prosecution fixing any facts other than that Dr. Burdell was killed, and that the accused was not guilty of the deed.

“After calling upon the Judge to direct the jury that, in accordance with the law and the facts, the accused must be declared ‘Not Guilty’ without leaving their seats, and telling the jury that such was their duty, he took his seat, to be followed by the District Attorney.

“THE DISTRICT ATTORNEY’S SPEECH

“Mr. Hall, in replying, said he did not rise to speak to the little audience of this room or the greater audience of

the newspaper world without. He would not be led into the discussion of any irrelevant issues, for he should remember that he was a public officer, and comment simply on the facts. He should not attack the newspapers, because that public officer who could not sustain the honest censure of his newspaper friends had no business to live and call himself a man of a civil character. It had been said that this was a very mysterious murder, but where was the mystery in it that discriminated it from any other murder they had read of? The disappearance of Dr. Burdell for a few hours that night was no more mysterious than the disappearances which were happening every day among ourselves, and which were only unnoticed because we were still alive in person to explain our disappearance if called on. In this case the accused had, to distract attention from herself, raised the hue-and-cry against this man and that woman, and called on the law to apprehend another; but the law was not to be so misled. It placed its hand upon her shoulder and said: 'What need have we to go further? You have the motive, the means, the ability, the presence, and you shall be held accountable in the judgment of the honest men of the world.' As to the question of motive, he insisted that there was not the slightest particle of evidence that Dr. Burdell had any other enemy in the world.

"He dwelt upon the ill-will shown to the doctor by all the members of the family. Even the servants were taught to slight him and refuse him obedience. They quarrelled with him and refused to go down-stairs to let him in at night when he was bolted out. So insecure did he seem himself in that house that he refused to eat or drink there, refused the food that was sent him, and took his meals at the principal hotels of the city.

"As to the marriage between the doctor and the defendant, the evidence was inferential only. The Counsel for the defence had conceded that it was not legally proved, and so the Court would charge them. But if there was a marriage, under old law when jealousy was proved against a wife, and her husband died in her house, she was called

upon to show that she had no participation in his death. If she were his wife, did that make the motive any less? Might it not make it greater? Yet this man of the world acted towards the defendant as if she was not his wife—had business dealings and litigation with her afterwards—swore before a Commissioner, in November, a month after the alleged marriage, that he did not have a certain note of hers. The question of the marriage, however, might be dismissed altogether from the minds of the jury. He contended that, whether sham wife or real wife, she was guilty of the murder. There was not only jealousy, but avarice. She was about to be turned out of the house—she was needy. Although Dr. Burdell, as she claimed, was her husband, she had to resort to Dr. Thompson to get her own notes cashed. There was a prospect of her being turned into the street—there was her motive for the deed. And her threats, how could they be explained? Threats, commencing months before, culminating only the afternoon of the murder—how were they to be explained on the supposition of her innocence? He argued that Mrs. Cunningham had sole control of the only clock in the house—Eckel's clock, which stood in her bedroom. She was the clock. The cook went to bed when she said it was ten o'clock; Snodgrass and the rest of the family when she said it was eleven. She directed the movements of the time, and, at her bidding, it went one hour ahead of the real time.

“The learned gentleman dwelt upon the evidence that the blow on the carotid artery was given by a left-handed person, arguing that there was proof of the fact. As to the theory that he must have been killed by a very tall person, why, a tall, strong man would have had complete control over him when, while seated in the chair, he received the first blow, and could have prevented him from ever rising from it. The strength of the right hand was to the neck, and while the head was back there was a complete purchase of the whole body, and a slight pressure upon Adam's-apple would enervate him immediately. Doctor Carnochan said that, according to his theory, there was not

room enough between the corner and the door to inflict a blow of that nature on the carotid. But the location of the room and the position of the doctor proved that a woman even shorter than the prisoner could have inflicted the blow. He would leave it to his friend the Attorney-General to comment on the evidence for the defence. There was no evidence that this woman ever saw the body of Dr. Burdell; she speaks only about herself and about the secret. Her first statement before the Coroner is about the house. 'I leased the house from Dr. Burdell.' Her co-defendant came right from his counting-house and gave his testimony, but she wanted Counsel, Counsel, Counsel! She had removed the doctor's pistol and lancet, in preparation perhaps of this very deed. Everything showed a concatenation of circumstances proceeding from the first slight circumstance to the last massacre. If mawkish sympathy enters the jury-box—if ever mawkish sympathy takes control of the jury-box, if men surrender their feelings as men, then there is but one other step to take. Mawkish sympathy has then but to ascend to the judiciary, which, thank God, it has not yet reached! Then strike the scales from the hands of Justice, pull the bandage away from one eye and place it on both, and let the community know that while it is true that juries

“ ‘When human life is in debate
Can ne'er too long deliberate,’

yet, that if they deliberate to such an extent as to give immunity to crime, by acquittal, when circumstances are damning, there will come into the world, and be inaugurated, that millennial triumph of the powers of darkness of which we all have read in Holy Writ.

“AFTERNOON SESSION

“The Court reassembled at three o'clock, when it was difficult for those engaged in the case to obtain admission, so dense was the crowd on the stairways and in front of the buildings. The interior of the court-rooms was packed as

during the morning session ; but, notwithstanding the crowd, there was neither noise nor confusion. Officers Bertholf, Bishop, Buchanan, and McKnight were successful in their efforts to keep order, and their attention to the ventilation of the court-rooms added greatly to the comfort of all.

“REMARKS OF MR. CLINTON

“The Court announced its readiness to proceed, and Mr. Clinton was to close the case for the defence. He had hoped that after the innocence of his client had been proven, the District Attorney would have recalled the gross attack with which he had opened the case, but in this he was disappointed, for in his remarks of to-day he had again repeated the same unwarranted assertions. Had he confined himself to his duty as prosecuting officer, he [Mr. Clinton] might have waived the right of summing up. Why was it that the District Attorney could not let the opportunity pass without distorting every particle of evidence? There was one part of the case that he [Mr. Clinton] wished more especially to advert to. The District Attorney had stated that an abortion had been performed on the defendant. There was no evidence of that, and he contended that it was a base slander. Did this report come from those who knew her best—from any of her associates? No, it came from the slanderous lips of a woman who was drugged with liquor. Hannah, the cook, was made to swear to it. He said ‘made,’ for the thumb-screws were applied to her by the notorious Coroner. But God had, in His wisdom, supplied an antidote to the poison she sought to instil into the jury-box. The face of this drunken cook bore the index of inebriation—it looked, indeed, as if she were seething in bad liquors. Had Hannah really made such a discovery as she claimed, would she not, in all likelihood, have spoken of it to some one in the house, or some person she knew? Yet the District Attorney put no question tending to corroborate her. On her cross-examination, too, she showed a reluctance to answer which no upright witness would have shown. The jury would see from her whole manner that there was

no reliability to be placed upon anything she stated, except where it was corroborated. Farewell, then, to this foul slander!

“But the public prosecutor had not rested here. He had sought to cast a shameful imputation upon the character of the defendant's eldest daughter. Was it not enough that his client should be made to suffer herself? But must the brand of infamy be sought to be placed upon the head of her innocent offspring? Great as was her affliction before, it was nothing to what she must have suffered when she heard these infamous slanders directed against her daughter. The jury should recollect that, in every instance where Hannah Conlan and Mary Donohue had testified to declarations made in the presence of other parties, they were flatly contradicted. Where they testified to conversations when no one else was present, they could not, of course, be contradicted; but inasmuch as they were contradicted where others were present, they were unreliable in every instance. He further alluded to the feeling displayed by the witnesses. Before the latter had left the court, she gave utterance to curses against the defendant. Yet with all their disposition to falsify, they were compelled to admit facts enough to carry the antidote with the bane of their testimony. They had to admit that, with the exception of the few altercations they testified to, the relations between Dr. Burdell and the defendant had been uniformly kind.

“With regard to the expressions alleged to have been made use of by Eckel on the morning after Snodgrass had let in Dr. Burdell, Counsel reviewed the circumstances, and asked if the act of young Snodgrass—this kind act of getting up and letting in the doctor—was to be twisted into evidence of bad feeling? This was a cool assurance on the part of the District Attorney, unparalleled, to ask them to find the defendant guilty because, on a certain night, the hall-door lock would not work.

“But the learned public prosecutor further laid great stress on the fact that the house was going to be let to Mrs. Stanbury. Now why should the defendant desire to keep

this house when she and Dr. Burdell were both to travel on the continent of Europe this summer? Suppose, even, that all the testimony of Hannah Conlan and Mary Donohue were true, what did it amount to? No complaint was made against Dr. Burdell by them, except when he wanted to bring in * * * * to live in the house. Was not she justified, as a mother and a wife, in objecting to have a woman of vile character live in the house? Why, had she not remonstrated, the District Attorney would have used it as an argument to show that her own character was bad.

"But, said the District Attorney, this lady had the means of despatching Dr. Burdell, and, therefore, they were to find her guilty of having killed him. Now, the pistol in her possession was accounted for by the fact that the doctor had requested her to keep it. The paper which the doctor had signed was made a great deal of by the public prosecutor. This, however, was easily accounted for when they recollected that the doctor had been reluctant to perform his engagements, and those papers had passed between them prior to their marriage. As to the suits of breach of promise of marriage and slander, sufficient had been said, and he would not take up time with that subject. If she was not married, the District Attorney argued that it was a circumstance tending to prove her guilty of the murder; while if she was married, he seemed to think it showed an equally strong motive on her part to commit the deed. Seeing that he could not bring forward any evidence to convict the defendant, he thought he would throw a stigma upon her family by saying that they bore an ill-feeling towards the deceased.

"It was further sought to be inferred that because Dr. Burdell had not on one or two occasions drunk some punch sent up by the defendant, therefore there was a feeling of enmity between them. How absurd was such an argument! As to this and other matters, he was quite willing to leave them to the jury without comment. The public prosecutor had said a great deal in regard to the motive of this woman to kill her husband. Now what earthly interest could she have had to seek his death? He was her husband, in the

receipt of a large income, and in a few months all secrecy was to be dispelled; and they were to have travelled together, and to have lived acknowledged as man and wife. Strange as it might seem, with all the foibles of Dr. Burdell, with all the rough points of his character, the defendant loved him as she loved her very existence. This would seem strange to those unacquainted with them; but such was the fact. Whatever had been said derogatory to his memory, even in her defence, was against her wishes. He would leave the case in the hands of the jury. He felt assured that she would be vindicated, and every stain placed upon her children by this atrocious prosecution would be removed.

“THE ATTORNEY-GENERAL’S ADDRESS

“Immediately after Mr. Clinton had concluded, the Attorney-General rose and addressed the jury for the prosecution. On the night of January 31, he said, a murder, excelling in atrocity almost any murder ever committed, occurred in this city, and created all over the country an excitement almost unparalleled. The person suspected of the commission of the murder was now on trial in that court, whither he had been summoned on the part of the prosecution to find out who was the murderer of Dr. Burdell, and not to convict Mrs. Cunningham. He would rejoice to see her acquitted if she were not guilty, but there was no sympathy due to her merely because she was a woman. If vengeance came to her, it was her fault; if her offspring had to drink of the bitter cup, it was her deed, not the deed of the Court—not the deed of the jury. He, as prosecuting officer, found himself upon trial there—the District Attorney was on trial. So much sympathy had been created for her, and it was even said that, if set free by the verdict of the jury, she would be followed home by a shouting mob, wild with exultation at her release. Let there be no such mob. If acquitted, let her indeed go home, and, in the silence and solitude of her chamber, thank God that He had delivered her from that fiery trial!

"That Dr. Burdell was dead no one disputed. No one denied that he was intentionally killed. It was the task of the prosecution, on behalf of the people, to show who did it. All the evidence was circumstantial. No one saw the deed committed. The evidence tending to the inculcation of the accused was composed of a chain of circumstances, any one of which, taken separately, would seem to be of small importance. But look at the bridge which spanned the mighty Niagara. Would any one think, examining one of those little links, that a sufficient number of them could be so firmly strung together as to compose a bridge able, in its strength, to sustain the weight of the rushing locomotive? So these little circumstances, added fact to fact and link to link, presented an accumulation of evidence which it might be impossible to resist. If the chain were broken, they must acquit the prisoner; if it were unbroken, they must convict her. All they had to do in the matter was to arrive at the truth; but he would warn them not to suffer their sympathies to carry them too far. Men act from motives; and had this woman any motive to commit this act? If Dr. Burdell were her husband, she either did or did not love him. Did she love him? All the family sat in her bedroom, occupied her bedroom—Snodgrass, Eckel—but who ever saw Dr. Burdell, her husband, there? A husband who never went into his wife's room when almost anybody else could go there! Then there were threats used. Well, for his part he did not believe much in threats. When two people quarrel, and one says, 'I will knock your brains out,' he simply means that he would knock the other down, if he dared to.

"But here is an extraordinary case. A woman goes to rent the house of Dr. Burdell; she goes to look at the rooms, and the defendant says, 'He may not live to see me out of this house.' The reality followed close upon the heels of prophecy. It had been asked, would she have said it had she intended to do it? The devil's bars are always too short at both ends, and to ask a person meditating a crime to act first like an honest person is asking too much.

If she did this deed, that remark was the devil within her speaking out. It was the interior woman speaking to herself rather than to the person who heard it. He would call the attention of the jury to some circumstances. The servants were sent to bed ; the girls slept down-stairs. And why ? Because one of them was going away. There was such a thing as proving too much. Unfortunately, the three slept in one bed, and the mother immediately went to sleep ; they would have enjoyed their conversation as well in their own room. He was not here to cast aspersions upon the daughters, but he would say that Hannah, the cook, was as much entitled to respect as they. It would not do to say that because she was an Irish cook she was not to be believed. The girl who earns her livelihood by the sweat of her brow is as much entitled to respect as the one dressed in gaudy colors who lives on Fifth Avenue.

“He drew the attention of the jury to the conduct of the defendant when she was first told of the murder. She remained in her room, at one time crying and fainting, at another talking of the property, while Snodgrass and Dr. Main went down to examine the body. But if she had been his wife, would she have so acted ? Would a loving wife, hearing of her husband’s violent death, have been prevented from rushing down-stairs and throwing herself by the side of the corpse ? She could have gone down, and, if fall she must, she would fall on the dead body of her husband, with a sigh that she had not been there to save him. But that woman never loved Harvey Burdell. He was not her husband. One of the jury had asked if she had power to go down-stairs. Yes, God gave her that power, and never took it from her. The Counsel for the defence had admitted that she was seduced by Harvey Burdell, and that she was not to blame for that. Is she not to be blamed ? She, a woman with two marriageable daughters, not to be blamed when she allows herself to be seduced ? There was another singular feature about the evidence : a doctor from Brooklyn had said that the defendant had rheumatism, and that her joints were weak-

ened. He [the Attorney-General] would like to have her, in a fit of passion, stand before that doctor with a dagger in her hand and see whether he would rely for protection on the rheumatic weakness of her joints. Ah, but—says the defence—it was done by an anatomist. An anatomist! You are to suppose that a surgeon steals into this man's chamber and artistically stabs him to the heart. Artistical nonsense! Was Bill Poole artistically shot when he got the bullet in his heart? And yet there is hardly a physician in the city who could have shot him in the same place! There is no necessity in a man going to a surgical college to learn to stab a man. As for the hymn sung by one of this woman's daughters the day after the murder, they say it was this:

“‘God moves in a mysterious way
His wonders to perform.’

“That was not the hymn she sang. It was to the same tune; but the words must have been:

“‘Woman moves in a mysterious way
Her wonders to perform.’

“The policeman's attention was called to this song, as he thought it a strange circumstance that singing should be carried on in a house where a foul murder had just been committed, and the inmates of which were suspected of the crime, one of them claiming that the murdered man was her husband. He would say to the jury that this was the most momentous case they had ever been engaged in. An acquittal of this woman, if she be guilty, will add but another to the many cases on record that no murderer can be convicted at all. All they have to do is to wait until the passion of men is dissipated, till the storm is passed over, and then, with the aid of an ingenious and talented Counsel, and with witnesses who are ready to swear anything, the sympathy is all turned in their favor. The consequences of a conviction are awful. This whole family would be ruined—these young daughters lost forever. They must suffer beyond

redemption. And these boys, too. But with that the jury had nothing to do, except so far that it should lead them the more carefully to scan the evidence, and see that their verdict was warranted by the evidence. He charged them to look to it that they did not convict but on evidence which was irresistible to their own minds, and which carried deep conviction to their bosoms. When you entered that box, you took the responsibility of standing between her and justice. God and the community so deal with you as you deal with yourselves, your own conscience, and your God !

“Mr. Dean wished to make a correction in the statement of the Attorney-General, but the Court objected, saying that the jury knew what the evidence was.”

CHAPTER XIV

CUNNINGHAM-BURDELL MURDER CASE (CONTINUED)

Charge of Judge Davies to the Jury.—The Verdict.

As soon as the Attorney-General had concluded his address, the Judge delivered the following charge :

“GENTLEMEN OF THE JURY,—The prisoner at the bar stands charged with one of the highest crimes known to the law, that of taking the life of a human being—Harvey Burdell—on the night of the 30th of January last. You have heard, with commendable patience and attention, the evidence in support and in refutation of this accusation ; and you have listened to the comments and scrutiny of the learned and eloquent Counsel engaged in this cause upon the testimony thus adduced. It now remains for the Court to state to you the principles of law applicable to this case, and render you such aid as may be in its power in classifying and arranging the testimony, and indicating the proper weight belonging to its various parts in your consideration of it. It can be hardly necessary for the Court to remind you, gentlemen, of the solemn and important responsibilities resting upon you. The oath which you have taken demands of you that you will true deliverance make between the people of this State and the accused, and its fulfilment solemnly requires of you that you divest your minds of all sympathy for, or prejudice against, the prisoner, or any of the various persons connected with this startling tragedy. You must close your minds to all external influences or considerations—divest them entirely of all bias or knowledge, even so far as you are capable, of the party charged with this crime, except

as it appears in the testimony which has been given since you were impanelled in this case. Above all, gentlemen, you must not forget that, although you are sitting upon the life of one who belongs to that sex which instinctively appeals to yours for protection and support and sympathy, and which forms the tenderest ties and associations of life, you are to shut your eyes and steel your hearts to those considerations. Crime knows no sex; and justice, in its administration, is no respecter of person, age, or condition. All stand alike equal in its temple, and those who are called on to minister at its sacred altar but bring ineffable disgrace upon its purity and their holy office if they can be swerved from their duty by improper influences or illegitimate considerations.

“The Revised Statutes of this State (2 R. S., 656-7, Sections 4 and 5) declare the ‘killing of a human being, without the authority of law (unless it be manslaughter or excusable or justifiable homicide, as thereafter defined), to be murder when perpetrated from a premeditated design to effect the death of the person killed, or of any human being,’ and in some other cases which are not material to be stated for our present purpose. That the homicide in this case was either justifiable or excusable cannot be for a moment maintained. If there is evidence in this case that sufficient deliberation was had to form a design to take life, and to put that design into execution by destroying life, then there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow or whether it be contemplated for months. It is enough that the intention precedes the act, although that follow instantly. The law has no favor to extend either to the rapid or slow execution of the design. Malice aforethought, or premeditated design to kill, may be conceived at the moment the fatal stroke was given as well as at any time before. Malice aforethought, or premeditated design, means intention to kill, and if such means are used as are likely to produce death, the legal presumption is that death was intended. So in the present case, if you are satisfied that such

means were used by the person or persons who inflicted these wounds upon the deceased as were likely to produce death, then such killing is murder, and the party who caused that death is guilty of that crime.

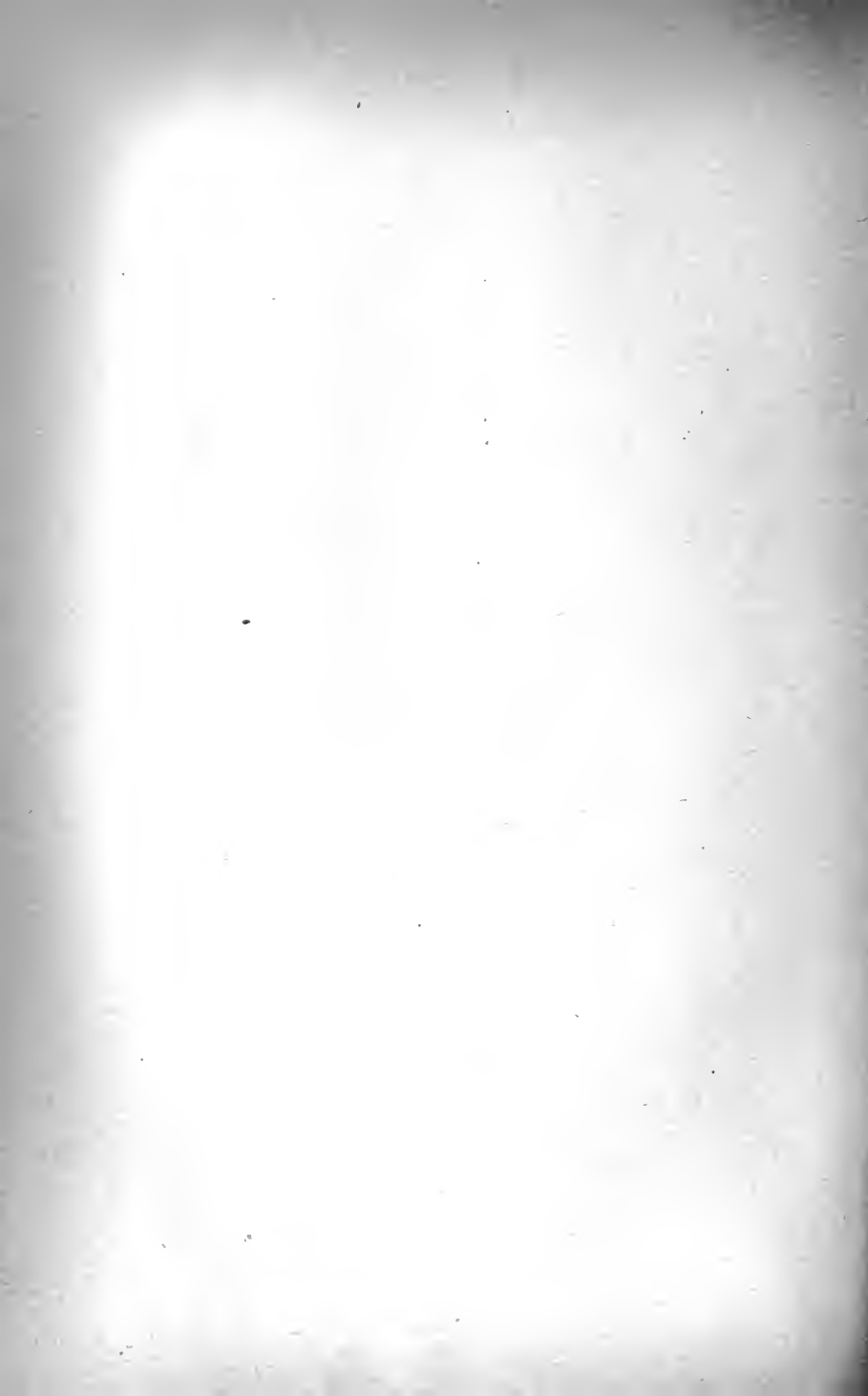
“Assuming, then, that you will find that the deceased was murdered, the next and the momentous inquiry in this case is, did the prisoner at the bar inflict those wounds which caused the death of the deceased or aid in the infliction of them? This question must be met in this case with calmness and a firm determination on your part to meet all its responsibilities. Public justice demands that the guilty, if ascertained, should make that expiation to the offended majesty of the laws which their violation demands. The peace and good order of the community and the security and safety of our domestic firesides alike demand that this great offence, if the offender can be ascertained, should meet its punishment. But these reflections, while they are powerful incentives to the discharge of our duty, and our whole duty, must not lead us to be the instruments of wrong or confound the innocent with the guilty.

“There are two modes of ascertaining and proving a state of facts: First, either by positive evidence, or, secondly, that which is in its nature circumstantial. The distinction between them is this: direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of issue on the trial—that is, in a case like the present, that the party accused did cause the death of the deceased. Whatever may be the kind or force of the evidence, this is the fact to be proved. But in this case no one was present at the time of the commission of the offence. No one saw the act performed which caused the death of the deceased, consequently there can be no direct or positive testimony by whom the offence was committed. It is wholly unsusceptible of strict legal proof. But experience has shown that in such a case resort may be had to circumstantial evidence—that is, that a body of facts may be proved of so conclusive a character, when taken into connection and as a whole, as to warrant a firm belief of the facts quite as



HON. HENRY E. DAVIES

Judge of Supreme Court of State of New York. (Afterwards Chief Judge of the
Court of Appeals)



strong and certain as that upon which prudent and discreet men are accustomed to rely in relation to their most important concerns. It would be fatal to the administration of justice if such proof could not be availed of in judicial proceedings, for if it were necessary always to have positive evidence, how many criminal acts committed in the community, destructive of its peace and subversive of its order and security, would go wholly unpunished ! Strong circumstantial evidence in cases of crime of murder committed for the most part in secret is the most satisfactory of any from whence to draw the conclusion of guilt ; for men may be seduced, and often are, to perjury, by many base motives, to which the secret nature of the offence affords peculiar temptations. But it can scarcely happen that many circumstances, especially if they be such over which they could have no control, forming together the links of a transaction, should all unfortunately occur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous. And in a case of circumstantial evidence, when no witness can testify directly to the fact to be proved, it is arrived at by a series of other facts, which, by experience, have been found so associated with the fact in question that in the relation of cause and effect they lead to a satisfactory and certain conclusion. As when footprints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell, and from the form and number of the footprints it can be determined with equal certainty whether they are those of a man, bird, or quadruped. As a familiar illustration, we find an apple on the ground. We know it is certain—there can be no doubt of it—that that apple once grew upon a tree—that it did not grow upon the ground. You find it lying in the street or on the grass. The conclusion inevitably is that that apple came from some tree, and that it grew there. This kind of evidence is the result of experience and observed facts and coincidences, establishing a connection between the true and proved facts and those sought to be proved. The advantages of evidence of this kind are that, as it is generally obtained

from several and distinct sources, a chain of circumstances is likely to be prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are that a jury have not only to weigh the evidence of facts, but, after you have deemed the facts established by the evidence, to draw the just conclusions from them, and in doing which, gentlemen, in this case you must not be led by prejudice or partiality, or from any want of due deliberation or sobriety of judgment, to make hasty and false deductions. This source of error cannot exist in positive and direct evidence. Then you have only to judge of the credibility of the witnesses, and, that being established, it follows that the facts testified to are to be taken as true.

“But, gentlemen, it is quite apparent that, after you have established in your own minds the facts proved, great care and caution ought to be used in drawing the inferences from these facts. These inferences must be fair and natural, not forced or artificial. The common law appeals to the plain dictates of common experience and sound judgment, and the inference to be drawn from the facts must be a reasonable and natural one, and, to a moral certainty, a certain one. It will not do that it is probable only ; it must be reasonably and morally certain.

“Another consideration is that each fact which is necessary to the conclusion must be distinctly and independently proved by competent evidence ; because it may, and often does, happen that in making out a case by circumstantial evidence many facts are given in evidence, not because necessary to the conclusion sought to be produced, but to show that they are consistent with it and not repugnant, and aid in rebutting a contrary presumption ; and the rule is, that all the facts proved must be consistent with each other and with the main facts sought to be proved (as in this case, the participation of the accused in the commission of the crime charged). It follows that if any other fact necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of

circumstantial evidence upon which the inferences depend, and, however plausible or apparently conclusive the other circumstances must be, the charge must fail. The circumstances all taken together must be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no one else, committed the offence charged. It is not sufficient that these facts and circumstances create a probability, though a strong one; and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for on any hypothesis which does not include the guilt of the accused, then the proof fails to make out the charge. It is essential, therefore, that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis.

“We must first be satisfied, as I have already stated, that the evidence establishes the *corpus delicti*, as it is termed, or the offence committed as charged; and in a case of homicide, like the present, you must be satisfied not only that the death of the deceased was by violence, but must, to a reasonable extent, be satisfied that you can exclude the hypothesis of death by suicide, or a death by the act of any other person. You must be satisfied of this beyond any reasonable doubt. If upon such proof there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. It is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but, as already observed, the evidence must establish the truth to a reasonable and moral certainty—a certainty which convinces and directs the understanding, and satisfies the reason and judgment of those who are bound conscientiously to act upon it. These rules, which are derived mainly from the case of the *People v. Webster*, laid down by the Supreme Court of Massachusetts, are well laid down by Edmonds, Justice, in the case of *Polly Bodine*; and, as they

are briefly stated by him, I will call your attention to them. First, the evidence must exclude to a moral certainty every other hypothesis but that of guilt. If you can reconcile the facts that are proved with the belief or supposition that the prisoner is innocent—that somebody else committed the guilty deed—then that hypothesis which the law requires does not exist in your minds. You are, secondly, to bear in mind that circumstances are sometimes fabricated by innocent persons falsely accused. As, for instance, an uncle was arrested for the murder of his niece. He was heard chastising his niece severely, and she was heard to cry out, ‘You will kill me.’ She was afterwards missing, and nobody knew where she was. The uncle was strongly interested in her death, because he would have inherited at her death. He endeavored to save himself by dressing up another child to serve as his niece. That very fact was, as might be expected, taken as very strong evidence of guilt. The man was convicted, and afterwards the child returned home, having eloped in consequence of her severe chastisement. There can be little doubt that fabricated evidence operated strongly on the minds of the jury. Fabrication is often resorted to by the really guilty to ward off suspicion from themselves. Another rule is, that the supposition of guilt must follow from all the facts, and be consistent with all of them, as I have before indicated to you.

“With these rules, gentlemen, and bearing them in mind, we will now proceed to consider the case before us. The theory on the part of the prosecution is that the prisoner committed the offence, because it is manifest that she intended to do so, and this intention was indicated by the threats she used and intentions expressed. If threats are used by a person having the power and opportunity of carrying them into execution, and the result threatened had been produced, then it is a strong circumstance, to fasten the guilt upon a party, to show threats used or intentions expressed. They are considerations of peculiar importance, and often controlling.

“It becomes important for you, therefore, gentlemen, to

consider the proof of the various witnesses in regard to this matter, and carefully to ascertain if any such threats or intentions were avowed by the prisoner. I do not think it necessary, after the very able and full comments of the Counsel, to go over it particularly. I have observed during the trial that you have been most attentive listeners to the evidence, and I have no doubt that all the prominent parts of it are engraven on your memory. You will remember that the important testimony on this subject was that of Hannah Conlan, Davis, a policeman, Wilson, and other parties of less significance. These witnesses have testified to specific threats, and if they are to be believed, it shows an intention on the part of the accused to inflict some injury on the deceased, either for a real or an imaginary wrong. In this connection, it is well for you to consider the relations between the deceased and the prisoner. On the part of the people, it is shown that they first became inmates of the same house on or about the 1st of May, 1855, and that, if the statement of Hannah Conlan is to be believed, about the 1st of December following the prisoner was delivered of the fœtus of a child, of which she alleged the deceased was the father. That, on the 1st of May following, the deceased rented a portion of his house to the prisoner for a year, and they continued inmates of the same house up to the time of his death. It would seem to be quite certain that at times they were not on very friendly terms. If the witnesses are to be believed, they frequently indulged in angry feelings towards each other, and it is for you to say whether those feelings resulted from wounded pride or unrequited affection, or from the omission of the deceased to fulfil his plighted vows to her, or proceeded from other causes.

“You must bear in mind that there is much testimony going to show that the deceased, on many occasions, held out to his friends and to others that he was paying attention to the prisoner with reference to making her his wife ; and that subsequently, as the defence alleges, on the 28th of October they were married. That does not seem, from my view of the case, to be an important consideration. If, however,

you deem it necessary, and you are satisfied from the evidence in the case that they were so married, you have a right to assume that in your deliberations. If you think that these things are adequate to satisfy your minds that either from threats, or revenge, or dissatisfaction, these expressions of ill-feeling proceeded from these causes, you will be justified in attributing them to that source. If, however, on the contrary, they proceeded from deadly hatred to the deceased, and emanated from a fixed determination upon her part to do him a personal injury, and to the extent expressed, then they are to be taken as strong evidence of such an intent; and if you are satisfied that the prisoner had the power, and was in the condition to commit, and could otherwise have committed the offence charged, they are evidence that such intent was accomplished.

“This leads to another inquiry: Could the defendant commit the offence charged? And this leads to the inquiry as to the transactions in the house on the night of the 30th of January. It would seem to be indisputable that it was arranged, in the early part of the day, that Miss Helen Cunningham should go with Dr. Beecher the next day, at 11 A. M., to Saratoga Springs to school. As soon as this arrangement was made, the family commenced preparations for that event. Taking the testimony of the inmates of the house, except that of Hannah Conlan, it would appear that all the members of the family—the prisoner, Eckel, two Misses Cunningham, and Snodgrass—were engaged till eleven o’clock in the preparations, when they severally retired to rest, the prisoner and her two daughters occupying the same bed, in the third-story front room; that they so occupied it until morning, the prisoner sleeping in the middle, between the two daughters; that they arose the next morning, and all took breakfast together as usual, except Mr. Eckel, who was called away by a note from Mr. Ely, as he proved; that after breakfast they all retired to their apartments together in this third-story front room, where they were when Hannah, the cook, announced to them the death of the doctor. You will also bear in mind the statement of the daughters as to the

dress of their mother on Friday and Saturday. Now, gentlemen, if this statement is true, if the testimony of these witnesses is to be taken as establishing these facts, and there is nothing going to show that what they told was untrue, there can be no doubt that the prisoner did not participate, herself, in this bloody tragedy. It is for you to say, after a careful and deliberate examination of the testimony, sifting it thoroughly, taking into consideration all the relations of the witnesses to the prisoner, and the circumstances narrated by them, and corroborated or contradicted by other witnesses, to say whether it is such testimony as you can safely rely upon.

“In this connection it is proper to consider the theory announced on the part of the prosecution. They rely upon the threats by the prisoner towards the deceased, and the bitter feeling, the ill-will, which was so frequently manifested by her towards him; that having been married to him and being desirous of getting speedy possession of a part of his property was an inducement to the commission of this crime; that these motives induced her to commit this crime, and are adequate motives therefor. I do not think it necessary to go into all the causes urged upon you by the Counsel of the prosecution as having produced this state of feeling between the prisoner and the deceased. Neither is it necessary to refer to the times at which these threats were expressed. If the testimony of Hannah Conlan is to be believed, they were expressed upon the very day of the death of the deceased, showing a continued expression of ill-feeling towards the deceased by the prisoner at the bar for several months at least. They also allege that she did it; and that upon the day the deed was committed she ascertained that a boarder in the house, Mr. Ullmann, was not to be at home until late in the evening; that she procured the preparation of a fire in the attic, to be lighted at any moment, for the purpose of destroying the evidence of her guilt; that it must have been committed by some one in the house, and that she was the only person in the house that day who could have any adequate motive for committing the crime, and, therefore, that she must have done it. That,

about midnight, an offensive smell was perceived in Bond Street, like the burning of clothes or leather, and that such burning took place, they say, is evident from the testimony of Dr. Parmly. In reference to the testimony upon that subject, you have, I doubt not, fresh in your minds Dr. Parmly's going out in the early part of the evening, when he smelt an offensive odor; his returning, going out again, and returning about eleven o'clock, when he smelt it more strongly than before, which he describes as a different odor, and the last he distinguishes as arising from the burning of leather or woollen clothing; also as to the fire in the front attic room, which he saw from the steps of his house. In this connection you will bear in mind the statement of Dr. Smith and of his son—the fact that Dr. Smith had that very afternoon been burning in his stove pieces of woollen and leather. Whether or not this offensive odor might not have been created from that source it is for you to say. You will also remember the testimony of Dr. Main, that he experienced the same offensive smell; also the testimony of a young gentleman, Mr. Baldwin, who experienced the same odor at an earlier hour; and also the testimony of a young gentleman who went through Bond Street, stopped at the corner of Bond Street, and who did not experience any offensive smell at all. You will also remember the testimony of Mr. Ullmann, who came into the house about half-past twelve, and experienced no sensation of this kind, and the testimony of the inmates of the house, who all concur in stating they experienced nothing of the kind. If I am incorrect in regard to this, Counsel will correct me."

Mr. Clinton. "You are quite right, sir."

His Honor. "Then, gentlemen, there is a theory laid before you that it was impossible, from the experiments tried, that these matters could have been burned in that grate in that room without penetrating through the whole house and creating an odor that would have existed for some hours—twelve to twenty-four. It is for you to take these circumstances into consideration, give them their due weight, and arrive at such conclusions with reference to

this fact as you may be advised. It certainly is an important fact for you to arrive at in the progress of the case, because, if you establish it affirmatively, it shows that there must have been some proceeding upon the part of the inmates of that house to do an extraordinary act, which, under the circumstances, might naturally and reasonably create the inference that they were endeavoring to destroy some evidence of guilt. But if you come to the conclusion that there was no matter of this kind burned there, that there was no fire there upon that night, then, gentlemen, the prosecution is without any theory, as I understand it, in reference to any attempt upon the part of the accused in respect to destroying evidence of guilt. Therefore I say that it is an important point for you to consider, because if you establish it in the affirmative, it tends much to elucidate the theory of the prosecution, and if you establish it in the negative, it is a very serious obstacle in the way of establishing their theory.

“It is alleged that the conduct of the accused on the Saturday when she heard of the death of Dr. Burdell, and her refusal to give testimony before the Coroner, are evidences of guilt. Now, gentlemen, it is a very ordinary means of ascertaining the fact of guilt or innocence to prove the conduct of the party at, and immediately after, the commission of the offence, and the conduct of the party on the first communication being made to them of the offence committed.

“You recollect the testimony of Hannah Conlan, who was the first person who announced the death of Dr. Burdell to the prisoner at the bar; you will bear in mind whether her conduct that morning, in dressing herself, in going down-stairs, taking her breakfast with her daughters and the rest of the family (Mr. Eckel was absent), returning to her room in the third story, engaging in her domestic avocations—if the witnesses are to be believed—whether it is consistent with guilt or innocence. You are also to bear in mind whether the conduct she exhibited at the time this communication was made evinced innocence on her part

of any instrumentality in the death of the deceased, or consciousness of guilt. This conduct has been so frequently alluded to by the learned Counsel upon both sides that it is not necessary for me to recapitulate it, but simply to call your attention to it. It is an important circumstance always—the conduct of persons charged with crime, when they first hear of the offence committed; and also their conduct when the crime is first charged home upon them. Now, among the ordinary evidences of guilt is also the conduct of the party after the deed is committed. Flight and concealment are considered very strong evidences of guilt always. Then the hearing before the Coroner's Jury—that also should be taken into account by you. Whether she manifested willingness to give evidence in relation to such circumstances as were in her knowledge, or whether she showed hesitation, and attempted concealment. You must look to that. And you will also bear in mind all the circumstances under which she was called down before the Coroner, and if you think she exhibited any disposition of concealment—a refusal to disclose what she knew—then that is to be taken as a circumstance against her. Then, gentlemen, another evidence, and which would have been a very striking one in this case, where a strong, stout, active, healthy man, as this deceased is proven to have been, in the prime and vigor of life, could have been murdered, as the deceased is alleged to have been, by a woman; whether such a *rencontre* could have taken place—whether such a result could have been produced by the prisoner at the bar, without leaving on her person some marks or evidences of such a *rencontre*. You remember the evidence of the physician, of such marks remaining upon a female longer than upon a male, and the reason given for that established fact. As no such marks were proven, except the one alluded to under the shawl—and that, I believe, was not made out at all by any evidence—I refused to permit the prisoner to show there were no marks upon her body, upon the principle, well established by law, that the party making the charge must prove it. Innocence is

presumed until guilt is proven always; therefore, in the absence of any mark you are to assume that her person exhibited no evidence of this *rencontre*.

“The appearance of the clothes of the accused. Now, upon the theory of the prosecution, they not having proven that any clothes in the house were defiled or stained, it must be perfectly apparent from the testimony of the physicians, and the evidences in the room which we have seen, that the person who did inflict these injuries must necessarily have been to a considerable extent covered with blood. I say the prosecution, not having had it in their power to show any evidences of garments in the house thus defiled or stained, unless you shall find the theory sustained that this fire in the attic was prepared for the purpose of burning those clothes, it follows that there being no appearance of any stains or of any blood upon any of the garments of the prisoner, or of any in her house at any time, you are bound to consider that there were none. But if you find that fact, it is very difficult to reconcile the guilt of the accused with the facts which have been proven in this case, and which are manifest and apparent to all, that the person who inflicted these wounds must have had upon his clothes and person marks of blood, if not marks of violence.

“Now, gentlemen, another evidence—and a striking if not controlling one of the guilt of the person charged with murder—is finding upon the accused weapons with which the deed either was perpetrated or with which it might have been perpetrated, or in any places over which the accused had exclusive control or possession—as, for instance, the case put by one of the Counsel of a person shot by a pistol-ball, where a pistol was found in the possession of the accused, from which it was possible that the ball had been shot, and when the dissection took place the ball found in the body of the deceased would not fit the pistol; therefore, that presumption, which, if the ball had fitted the pistol, would have been regarded in law as conclusive, failed entirely, because the two did not agree. Now, if in the present case there had been found upon the person of the

accused, or in any one of her drawers over which she had exclusive control and possession, a weapon such as was competent to inflict these wounds upon the deceased, the case would have been a very strong one—nay, I may almost say a conclusive one—unless there were some other controlling facts tending to show that the injury was not inflicted by the person who was in possession of the weapon.

“Now, how is it in this case, gentlemen? While there was found in the possession of the prisoner—for I consider the bureau in her possession—there was found in her possession this dirk [holding up the dirk to the view of the jury], which I have had one of the officers of the Court measure very carefully—its length is four and a half inches. It is half an inch at the hilt, tapering down to a point. Dr. Uhl says those wounds could not have been inflicted with this instrument. Dr. Knight, Dr. Wood, and Dr. Uhl measured the wounds, and the statements that they have given show conclusively that these wounds were not inflicted by that instrument—just as in the case of the pistol-ball. It is a perfect mathematical demonstration. Then the lancet-blade is thrown out of the case entirely. Then, gentlemen, the only item of evidence about this matter is the pistol being found in the possession of the accused.

“Now, it is not alleged or pretended in this case that the wounds were inflicted by the pistol at all, but it is argued that the possession of a pistol by a female is evidence of some murderous intent. Now, what is the evidence in regard to this pistol? Dr. Maguire states that he was present when Dr. Burdell purchased it, or one very much like it. I judge from the subsequent testimony that we commit no error in assuming that this was the pistol which Burdell originally purchased with Dr. Maguire and used as his own. The testimony of one of the Misses Cunningham is that this pistol was given by Dr. Burdell to Mrs. Cunningham while she was living in Twenty-fourth Street, before she went to the house in Bond Street. It is not a very controlling circumstance in any event, because it is not pretended or alleged that any of the wounds inflicted upon the deceased

were inflicted by a pistol. The most that can be made of this circumstance, supposing that the prisoner had inflicted the wounds, is that it was evident that she had intended at some time or other (as it is argued on the part of the prosecution) to carry out the design which she had expressed in reference to injuring Dr. Burdell.

“ Whether the possession of the pistol under these circumstances affords a reasonable presumption for you to draw is for you to say. The next inquiry which presents itself is, had the prisoner at the bar the physical strength to inflict those wounds? That is a very important question for you to answer, if you get so far as this stage of the case. It is true, gentlemen, and you must bear it in mind, that a person excited by passion would do fourfold what the same person unexcited could; and to determine this question, you must regard the testimony in regard to the strength of resistance which Dr. Burdell would naturally be supposed to make. And it appears to me that this is a very proper point at which to state to you the testimony in reference to the manner in which those wounds were inflicted, saying nothing now about the person who inflicted them. I think all the physicians agree that the first wound was inflicted on the right shoulder while Dr. Burdell was sitting in his chair at the desk in the centre of the room, about midway between the door and the rear of the room. The person, to have inflicted that wound on him, must necessarily have been either in the room when he came in or was, perhaps more probably, concealed in the front room, and came out after the doctor had seated himself in his chair; for you will remember that it is in testimony that the door of the front room was locked, and the other access to those two rooms, which we have seen had a passage between them, was from the door of the doctor's office, of which he had the key, and when he went out it was his custom to lock it. Now it is alleged on the part of the prosecution, as one of their grounds of argument to bring the charge home to the prisoner, that she had the key of the doctor's rooms, and that she could, and probably did, gain access to them; and she must have been in them, to

make out their theory, at the time when he returned to go into his room.

“ You will remember that the bracket-light at this side of the window—this bracket-light which was near the instrument-case—was found lighted in the morning precisely as it was left at night, with head pretty well on ; some witnesses say that it was full on, some that it was not quite full on. You will remark, I asked the question whether the light was sufficient to enable a person sitting in this chair at the desk to read. My object was to see how generally it lit the room. The answer was in the affirmative, and the room, not being a very large one, must have been very fully lighted. Doubtless the doctor was seated there examining his bank-book, or perhaps reading the newspaper, and the person who inflicted this wound on the right shoulder must have necessarily approached him from behind. Dr. Uhl says (and he was concurred in) that the wound must have been inflicted from behind while the doctor was sitting, because the wound was on the right shoulder, and drops of blood were found on the right side of the chair, as though blood had dropped there from the wound. Some of the witnesses seemed to think that this wound must have been inflicted by a person taller than Dr. Burdell. It is for you to say, if it was inflicted while he was sitting down, whether it must have been inflicted by a person taller than Dr. Burdell or not. It is very apparent, I think, that when that wound was inflicted there was something applied to the neck (as from the medical statements there would seem to have been), something either in the shape of a cord or a handkerchief or a rope—something which was thrown around, which produced a strangling ; whether it was done by the pulling of a handkerchief or by a cord, it is evident that there was some effort of this kind. Immediately the doctor must have sprung up from the chair and made for the door, because the side of the door and the side of the wall manifestly exhibit it, the blood which came from this wound remaining there. The person must have necessarily got the doctor quite into the corner of the room, and I think that

probably would account for the abrasion on the nose spoken of by Dr. Uhl. His head was pushed up into the corner of the room. I think that this theory is sustained by the evidence in the case, for all the other wounds upon the body were upon the left side, and none on the right side at all—not one of them. It seems, if I have correctly looked at the testimony, that the person who inflicted the wounds had the doctor in the corner of the room, and that the wounds were thus inflicted which caused his death; that he must have dropped down almost instantaneously in the corner, and was drawn a little out, so as to permit the opening of the door, and there lay where he was found the next morning. That seems to me the result of this testimony, from the attention I have been able to give it. I am satisfied that is the theory of the case, and I think all the testimony harmonizes with that view of it. Now, supposing that to be the theory of the case, had the prisoner at the bar physical strength to have produced those results? And, in reference to settling this question, you are to bear in mind the circumstances which have been already detailed—the depth and the number of the wounds—fifteen in number; the circumstances of resistance on the part of the deceased; the absence of all evidence of any injury to the person of the prisoner, and the amount of force necessary to inflict those wounds. In reference to this point, it will be necessary for you to consider the evidence of the witnesses and use your own observation as to the force necessary to inflict such wounds, and in this connection also you are to take into consideration the testimony of Dr. Catlin in reference to the alleged disability of the prisoner by reason of the rheumatic affection with which she was afflicted three years since. You have heard all the testimony on this subject. The theory was started that the wound on the right side was inflicted by a left-handed person. Dr. Francis thought it might be so. Others thought it might be or might not. You will judge, from the position of the body and of the wounds, if you arrive at the view which I have expressed to you as to its position at the time the wounds were inflicted, whether

or not a left-handed person could have inflicted them. By the testimony of Dr. Catlin it would appear that the rheumatism affected the prisoner's right arm and shoulder to a much greater degree than the left. The theory of the prosecution is that a left-handed person gave this blow, that the prisoner was left-handed, and that the natural conclusion was that it was inflicted by her. You will remember the testimony which has been given in reference to the use of her left hand, and her reason for using it, and you will make such deductions as you deem proper.

"If you come to the conclusion that the prisoner had the physical strength to inflict those wounds, then you must bear in mind the testimony which has been given in reference to their being inflicted by a person taller than Dr. Burdell. Dr. Main, the first witness examined, supposed that the blow must have been inflicted by a tall man when they were standing up—that is, the blow under the ear—and some of the other physicians expressed the same idea. If you are satisfied that the blow was inflicted by a person taller than the doctor, then, of course, it could not have been the defendant, for it is conceded that she is shorter than the doctor. Then there is another theory in the case—that those wounds were of a peculiarly mortal character; that they were nearly every one of them fatal or mortal blows, and that they must have been inflicted by a person having an anatomical knowledge of the human system. It is only necessary for me to call your attention to the testimony of the physicians on the subject. Drs. Francis, Uhl, Woodward, and Carnochan, all, as I understand, concur in the opinion that the blows were peculiarly accurate blows. It is for you to say whether this was accidental or not, or whether they were inflicted by a person who must have possessed anatomical knowledge of the human system, knowing where to strike home every blow that was inflicted. There is no proof on the subject that the prisoner has or has not such anatomical knowledge; and, if you are satisfied that those blows were inflicted by a person having anatomical knowledge, to have brought it home to the prisoner, it would have been neces-

sary for the prosecution to show that she had such anatomical knowledge.

"I have not felt it necessary to discuss the various theories in reference to whether persons might have got in from the back part of the house or the front, or to call attention to the various suggestions made in reference to this subject. I will state, gentlemen, that you must look at this case with reference to the prisoner at the bar, whether the hypothesis is sustained so as to exclude the idea that this death could have been caused by any other person. In reference to this rule of evidence, I will quote an old and well-known authority: 'The case must be such as to exclude to a moral certainty every other hypothesis but that of the guilt of the party accused.' In case of doubt, it is safer to acquit than to condemn.

"Gentlemen, I have now discharged the duty which the law imposes upon me in this most painful and exciting trial. I think that you will bear me witness that I have exhibited no other motive than to elicit the truth, and the whole truth, and to aid in placing before you any facts which could avail you in solving this great crime. My duty is now ended, and you have to retire to your room, calmly to deliberate and decide on the fate of this unhappy woman at the bar. Meet your whole duty like men feeling your deep responsibilities and the solemnities of your oaths. To your decision I now commit the fate of this unfortunate woman, and the future of herself and her family. While you deal justly by her, it is your privilege also to deal mercifully; for, as I have before remarked, if you have any reasonable doubt of her guilt, that doubt is to be cast into the scale in her favor, and entitles her to your verdict of acquittal. If, on the contrary, on a review of the whole case, you deem the charge contained in the indictment proven, it is your duty to your country and your God to say so, though it be with anguish of heart, and may cause deep shame and sorrow to others. But if, in this final reviewing, you are not satisfied of her guilt, pronounce a verdict of acquittal, and let the accused go free."

The jury retired, and, after an absence of a few minutes, returned into court and rendered a verdict of "Not Guilty."

The proceedings in the case, including the entire testimony on both sides and the charge of Judge Davies, are reported in *People v. Cunningham*, 6 Parker's Criminal Reports, 398.

The prosecution of Eckel was abandoned, and a *nol. pros.* was subsequently entered.

CHAPTER XV

CUNNINGHAM-BURDELL MURDER CASE (CONTINUED)

Views of Mr. Clinton.—Comments of the Press in Respect to the Murder Trial.

THE great object for which Mr. Clinton had labored so earnestly—and to achieve which he had devoted nearly all his time for over three months—was now accomplished. His client was forever free—at any rate, so far as the law was concerned—from the charge of having murdered her husband. Did the verdict of “Not Guilty” speak the truth? The whole civilized world was deeply interested in the answer to this question. No one then living, or now living, aside from Mrs. Cunningham and the one who perpetrated the murder, was as well qualified to form a correct opinion on this subject as Mr. Clinton. As her leading and principal Counsel he had the chief—in fact, almost the sole—direction, as far as her interests were concerned, of the preparation for, and the conduct of, the trials before the Surrogate and in the Court of Oyer and Terminer. She had acted under his advice throughout from the day after the discovery of the murder. He had her entire, unqualified, and absolute confidence. She assigned to him not unfrequently, as a reason for this, that whatever she said to him in professional confidence she never heard of again; but what she told any of her other Counsel came back to her. In all her statements to Mr. Clinton he never found her to deviate a hair’s-breadth from the truth. She knew the importance of making no misstatements

to him. If she desired to keep from him a knowledge of matters about which he inquired she could maintain silence; but whatever she did say was the truth. Mr. Clinton (though it may not have been good judgment or in good taste for him to do so) participated in the unusual and intense desire to ascertain whether she had any knowledge, direct or remote, or even inferential, as to who murdered Dr. Burdell, or as to whether she had any knowledge of his assassination before the office-boy the next morning discovered the dead body. On various occasions, from the time he was first retained to defend her, he questioned her on the subject. He used all the skill of which he was capable in eliciting from her the truth on this subject. He plied his inquiries when she was in good spirits and when she was in low spirits; when matters appeared to take a turn in her favor, and when everything seemed to work against her; when she was sick and when she was well; when she was on her guard and when she was off her guard—in short, at all times and seasons and under all possible circumstances, Mr. Clinton did his utmost to ascertain the exact truth. Her answers were always the same—that she knew nothing whatever on the subject. Had she been guilty, or had she possessed any guilty knowledge, he does not believe that during all this time she could have deceived him so as to make him believe in her entire innocence. Had she not been wholly innocent, he believes that in some unguarded moment something would have passed her lips from which he could infer, at least, guilty knowledge. Mr. Clinton, from the time he first saw her, never had any doubt of her innocence. During the long period which has elapsed since the murder (now over forty years) he has never seen, nor known, nor heard anything to shake his belief in her innocence. Whatever may have been her faults and offences in respect to other matters, he believes her to have been

wholly guiltless of the murder of Harvey Burdell. Who, then, did kill him? That is a question easily asked; but in all human probability it can only be answered by the man (if he be alive) who perpetrated the murder. There can be no doubt that many an enemy had ample motive to wreak deadly vengeance upon Dr. Burdell, because of the fate of wife, sister, or daughter whom he had deeply wronged. Mr. Clinton has always believed that such was the motive which prompted the murder; but he never had the slightest suspicion as to *who* perpetrated the deed. But whoever he was, there could have been but little doubt of his discovery had the Coroner's inquest been conducted with skill and discretion. Probably the real assassin attended the inquest and was entirely familiar with the Coroner's proceedings. Delighted, indeed, he must have been to be thus shielded even from suspicion. On the evening of her acquittal, Mr. Clinton and ex-Judge Dean visited 31 Bond Street, and there saw Mrs. Cunningham and her family. Mr. Clinton, at this time and under these circumstances, for the last time made an effort, in conversation with her, to ascertain, if possible, whether she had any knowledge, or even suspicion, as to who assassinated Dr. Burdell. Her answer was the same it always had been, that she knew nothing whatever on the subject.

The following are fair specimens of the comments of the Press upon the result of the trial:

EDITORIAL IN THE NEW YORK DAILY TIMES, MONDAY,
MAY 11, 1857.

"The trial of Mrs. Cunningham for the murder of Dr. Burdell ended on Saturday evening in the *acquittal* of the accused. No person who had made himself at all familiar with the details of this case probably expected any other result. Under the circumstances of the deed, it was natural

and unavoidable that suspicion should fall upon this woman. The murder was done under her roof, upon a person towards whom her relations were equivocal, with whom she had had difficulties and lawsuits, at a time when she was certainly in the house, and in such a manner as to render almost incredible — and, therefore, evidence of guilt — her assertion that she heard no noise of any account, and had no knowledge whatever of the perpetration of the deed. The proceedings before the Coroner were more like a conspiracy than an inquest, and accumulated against the woman thus exposed to suspicion an immense amount of scandal and of public odium. Unlimited scope was given to malignity and gossip — everybody who had ever quarrelled with her, or heard anybody else who had, was permitted and encouraged to open the budget of defamation, and to deal out with lavish and remorseless hand the most damning accusations, suspicions, and innuendoes against herself and every member of her family. The result of this was precisely what was intended. Nine-tenths of the whole community set it down as absolutely certain that she was the murderer, and that the whole family, children and all, were partakers in the crime.

“A trial before Judge Davies, fortunately for justice, is a very different proceeding from an inquest under Coroner Connery. Evidence was substituted for gossip and fact for scandal. The cold, impartial reason of the law took the place of heated passion and coarse ignorance. The trial was very fairly conducted—no undue attempt was apparent on either side to wrest the facts from their proper meaning; the Judge’s charge was eminently clear, firm, and impartial—and the verdict of the jury was reached with the least possible delay consistent with proper forms and due deliberation. We believe that verdict to be just ; and, so far as the evidence at this trial affords basis for an opinion, we are confident this must be the universal judgment of the public. The scandals of the inquest will undoubtedly leave upon very many minds the impression that facts exist indicative of guilt which could not be brought forward be-

cause they do not fall within the legal definition of evidence. Such are Dr. Blaisdell's assertions concerning Burdell's statements made to him on the day of his death, which undoubtedly went further than anything else at the inquest to fasten upon the public mind the belief of Mrs. Cunningham's guilt. Whether these circumstances would stand the test of legal scrutiny any better than did the others which were submitted to it must probably forever remain a matter of pure conjecture.

"It is certainly remarkable how thoroughly every fact which was believed to form a link in the chain of circumstantial evidence against her was explained and its force dissipated upon the trial. It seemed impossible that even the faint cry of 'Murder!' said to have been heard in the street from Dr. Burdell's room at eleven o'clock, should have been unheard in the front room of the floor above. But it was proved by actual experiment that when the doors were closed very *loud* cries of 'Murder!' were quite inaudible there; and for some reason or other the District Attorney abandoned the effort to prove that any cries were heard or made at all. In the next place, the finding of two daggers and a loaded pistol in Mrs. Cunningham's possession was held to show a preparation on her part for the murder and to indicate her as the perpetrator of it. But it turned out that the pistol was given to her long before by Burdell himself, and that the daggers could not possibly have done the deed. Next, the presence of a flaring, flickering light in an upper, unused attic, seen by Dr. Parmly, was cited as evidence that a fire had been kindled there to consume clothing that must have borne evidence of the deed. But this light proves to have been that of a candle, left in the hall and shining through the open door of the attic to light Snodgrass as he came up to bed. Then the strong smell of burning leather perceived in the street, which at first was charged to the same theory, was proved to have proceeded from the grate of Dr. Smith, who was consuming the relics of leather, etc., used by him in his experiments. And so of every circumstance indicative of guilt in the case.

The whole chain of evidence had been utterly and hopelessly broken; not a link remains.

“The mystery of the murder is deepened by the trial. It seems now altogether probable, if not certain, that the deed was perpetrated by none of the inmates of the house, but by some one from without. Who he was may forever remain unknown. No progress is likely to be made towards his detection until it shall be ascertained *where Dr. Burdell spent that evening*. It is very evident that those who *know* have some motive for *concealing* their knowledge of the fact. We do not consider it by any means certain that the hour of the murder was as late as eleven, or even ten, o’clock. The cries that were heard were too faint and too uncertain to warrant any conclusion upon that point. Two or three witnesses on the inquest testified to having seen a man wearing a shawl enter the house between ten and eleven; but Dr. Smith swears that *he* entered his house at the next door, similarly dressed, at just about that hour; and he may have been the person seen by the witnesses referred to. A druggist’s clerk stated on the inquest that he saw Dr. Burdell standing at the corner of the Bowery and Bond Street at about nine o’clock, as if waiting for some one; and this is the only clew we have to his whereabouts after he was seen to leave the house at about half-past four in the afternoon. Where had he been, and who had been with him, in the meantime? When these questions shall be answered, we may have some clew that will lead to the detection of his assassin.

“It is not very likely that the inquiry will be pressed much further by our authorities. No reward has been offered for the discovery. The stimulus of curiosity has lost its strength. Nobody but the helpless woman under suspicion has any special motive for finding out, and it is probable that our Department of Police and Criminal Law will assume the disgrace of permitting this bloody deed to pass with entire impunity rather than make any further special effort for its exposure.”

EDITORIAL IN THE NEW YORK *TRIBUNE*, MONDAY, MAY 11, 1857.

"The trial of Mrs. Cunningham-Burdell for the murder of Dr. Harvey Burdell resulted on Saturday evening, as everybody for days had known it must result, in a verdict of acquittal. * * *

"The public has reason to be dissatisfied with the developments of this trial. Dr. Blaisdell would seem to have been one of the last persons known as in communication with Dr. Burdell; and they, too, are understood to have had an appointment for a further meeting at nine o'clock on that fatal evening. Why was not Dr. Blaisdell on the stand and allowed to explain his relations with Dr. Burdell, and the causes (if known) of the failure of their appointment? Dr. Blaisdell, it appears, was in court during the trial, expecting and desiring to be called. Who can say why he was not? It is the duty of the public prosecutor in such a case not to present the dark side of the matter only, but to endeavor to elicit the whole truth; and it is hardly possible that Dr. Blaisdell's testimony should not have cast some light on the Bond Street tragedy. Does anybody believe it impossible to ascertain where Dr. Burdell spent the last evening of his mortal career? Have the energies of our police been directed to the elucidation of that mystery? If not, why not? Why was Snodgrass held to bail in the sum of twenty-five hundred dollars for his appearance as a witness for the prosecution, and then never called on that side? Mr. Hall stated to the Court that the English practice requires the prosecutor to call every witness whose name has been endorsed by him on the indictment, but that the practice here is different. Then we must say that the English way seems decidedly the more consistent with the dictates of justice and fair-play.

"As to Mrs. Cunningham, or Burdell, we do not hesitate to say that she has been treated with great harshness, not only by the ministers of justice, but by the Press—unintentional, no doubt, but none the less real. By whose cunning and address the finger of suspicion was first pointed towards

her we do not know. When that point is ascertained we may be able to give a guess at the name of the real culprit. From the moment that Dogberry took into his sage cranium the notion of her guilt, she has been dealt with as though no treatment could be bad enough for her. The proceedings before the Coroner, the indecent examination of her person, the opening of the District Attorney, were all of a piece. Yet it would be difficult now to indicate a single plausible reason for the mountain of suspicion and odium heaped upon her. That she had trusted unduly in Dr. Burdell's promises, and afterwards compelled him to fulfil them—that he soon proved unfaithful to her, that quarrels and high temper naturally ensued, and that he wished to be rid of her—so much is plain; but that she was ever improperly intimate with Eckel, or that her daughters were not respectably trained and virtuous, there is no reason to assert. That she was married to Dr. Burdell, and that their subsequent differences grew out of his infidelity to the obligations thus reluctantly assumed, we have no manner of doubt; and we believe this will be legally demonstrated to the satisfaction of the public. At all events, her connection with the deceased has involved her in a web of difficulties and trials from which few women would have lived to be extricated.

"It remains only to be noted that Messrs. Clinton and Dean conducted the defence with signal ability and discretion, and that Judge Davies deserves something more than the matter-of-course credit of knowing his duty and doing it without fear or favor. By his capacity, suavity, and readiness the city was saved the cost and all parties the loss of at least one week's extra time—long trials having become chronic in this locality. In this instance we cannot perceive that even an hour was wasted."

EXTRACTS FROM AN EDITORIAL IN THE NEW YORK *HERALD*,
MONDAY, MAY 11, 1857

"The Burdell trial, which for the last few weeks has excited so much speculation, is at an end, and we shall now probably only hear of it as one of those mysterious events

which for generations furnish subject for wonder and awe to fireside listeners. We question whether the *causes célèbres* of any country make mention of any case more singular or memorable. When we consider the unparalleled boldness and fearlessness of the deed, the little apparent effort resorted to to escape detection, and the mysteries in which it continues involved—notwithstanding three protracted investigations—it will be regarded either as one of the most successful crimes or as one of the most lamentable failures of justice on record.

“With the verdict of the jury we have no fault to find. It was strictly in accordance with the evidence presented to them. Regarding that evidence in all its legal bearings, we are bound to arrive, with the jury, at the conclusion that Mrs. Cunningham is innocent—innocent, at least, of any direct participation in this murder ; and that conclusion, of course, also legally absolves her partner in the accusation—Mr. Eckel. Mrs. Cunningham is, therefore, by the law formally restored to the position from which the law temporarily degraded her. She will resume her place among her peers of Bond Street and the fashionables of Saratoga Springs, and it is probable that the celebrity attached to her by this trial, so far from injuring will enhance the social successes of herself and daughters. New York society is so singularly constituted that we must be prepared for all such startling inconsistencies.

* * * * *

“After the strong statements made by the District Attorney in his opening speech, more was expected from the evidence for the prosecution than was disclosed in the testimony taken before the Coroner. Instead of the promised developments, we find, to our amazement, that not only is there nothing new to add to the evidence against the accused, but that much that was previously considered important is withheld. The testimony of Farrell, the evidence regarding the purchase of the dagger, and the testimony of Dr. Blaisdell are all shut out from the record.”

CHAPTER XVI

CUNNINGHAM-BURDELL CASE BEFORE THE SURROGATE

Continuation of the Trial before the Surrogate in Respect to the Genuineness of the Marriage between Dr. Burdell and Mrs. Cunningham on the 28th of October, 1856.

ALTHOUGH the entire object Mr. Clinton had in view in making application to the Surrogate to issue letters of administration to Emma A. Burdell (otherwise called Cunningham) as the widow of Dr. Harvey Burdell, deceased, had been accomplished, yet it was necessary to proceed with the trial of the issue of fact as to whether she was his widow. Accordingly, on the 24th of May (two weeks after her acquittal) that trial was resumed. It was continued from time to time until the 30th of June, when the testimony was closed. Over one hundred witnesses were examined. A vast deal of testimony was given by both sides in respect to the relations—whether hostile or friendly—existing between the claimant and Dr. Burdell from 1854 until his death. The evidence showed that from his first acquaintance with her, soon after the death of her husband, Mr. Cunningham, until early in the summer of 1856, Dr. Burdell always spoke of her in terms of the highest praise. He was uniform in the expression of his regard and admiration. This was the more remarkable as he had ever avowed his utter want of confidence in any of womankind. Although to a large extent he was peevish, fitful, and fickle, yet for about two years his all-absorbing fascination for Mrs. Cunningham received no check. His re-

spect and admiration were unbounded. From his first acquaintance with her until June, 1856, she appeared to have no rival. From the evidence it would appear that during that period she was the only woman on the face of the earth for whom he entertained any great regard or profound respect. As to his uniform praise of, and devotion to, her up to June, 1856, the witnesses on both sides testified with equal positiveness.

Mrs. Cunningham's first appearance in the evidence was in 1846, as a member of the Presbyterian Church of which the Rev. Dr. Snodgrass was pastor. Her husband—in years greatly her senior—who was in good and respectable business, attended the same church. In 1854 he died, leaving, as was supposed, a comfortable estate. Thus, at a comparatively early age she was left a widow, with a family of young children, uncommonly bright and interesting, upon her hands. Under these circumstances Dr. Burdell sought her out, made her acquaintance, and pertinaciously and continuously for two years paid his attentions to her as a suitor. He sought in every way to make himself useful, in attending to her business and domestic and family affairs. Adam Schenck, keeper of a public-house at Elizabethtown, testified that in the spring of 1855 Dr. Burdell brought Mrs. Cunningham there and introduced her as a rich widow, and said she wanted to purchase property in the neighborhood. James Fairbank testified that on this occasion Dr. Burdell was very attentive to her.

The fact that Dr. Burdell regarded Mrs. Cunningham as a woman of wealth may in his estimation have added to her charms. His opinion in respect to her wealth was very decided. He told Dr. E. L. Roberts that she was worth two hundred thousand dollars, and he had seen the deeds of her property. Dr. Burdell spoke of her to Dr. Main, to his cousin, Mrs. Williams, Alexander

Frasier, Dr. Uhl, Henry J. Sibberly, Mr. Sanxay, Dr. E. L. Roberts, and others, as being a rich widow. To some of them Dr. Burdell said she was very wealthy. To some he represented her as worth one hundred thousand dollars. That she possessed ample means to support herself and family he had no doubt.

Hester Van Ness, who had known Mrs. Cunningham since 1844, testified that in the winter of 1854-55, while she and her family lived in Twenty-fourth Street, New York City, Dr. Burdell often visited there and spent the evenings with her; and that when, in the spring of 1855, she and her family stayed a few weeks at Dr. Wellington's, in Twelfth Street, he was equally attentive to her. Miss Van Ness testified that while Mrs. Cunningham was in Twenty-fourth Street, Dr. Burdell spoke very plainly before the witness, who was regarded as a friend of both; and his manner and language to Mrs. Cunningham "were very endearing—often foolishly so." They asked her to be bridesmaid when they would be married. She testified that Dr. Burdell desired her to influence Mrs. Cunningham "to throw off her black dresses when she was only a year a widow, and remarked that a fine woman like her should not bury herself for any man."

In the summer of 1855, when Dr. Burdell was at Congress Hall, Saratoga Springs, he made arrangements for Mrs. Cunningham and one of her daughters to come there. When they arrived he received them, and entered their names on the hotel register. He took his meals with them and spent most of his time in their company. He introduced them to his friend, Dr. W. B. Roberts; to Mr. Frasier, vice-president of the Artisans' Bank, and his family; to Mr. Platt, president of the bank, his wife, and a large company who were at the hotel with them. Dr. Burdell stated that she was a widow worth one hundred thousand dollars, and that he

was desirous of showing her attention. After this he was constant in his attentions.

The portion of his house, 31 Bond Street, which he did not occupy he had rented to Miss Jones, who kept boarders. She and Dr. Burdell, by their importunities, induced Mrs. Cunningham to go there to board in the autumn of 1855. Miss Van Ness testified that this was against her advice; because she thought it improper for Mrs. Cunningham, "as a widow, to board in the house with the doctor, a bachelor paying her attentions." In this regard Miss Van Ness was right. Mrs. Cunningham made the great mistake of her life when she went to live under the same roof as Dr. Burdell. Under the circumstances, their mutual fascination was extraordinary. She was intelligent, interesting, attractive, and possessed of strong intellectual characteristics. He, despite his lack of moral principle (which for a long time was hidden from her), was socially interesting, companionable, agreeable, well educated, well read, and, when on his good behavior, of charming manners. She, as he said, was a most devoted mother. Her devotion to her children and the admirable manner in which she brought them up, in his mind, as he professed, lent additional charms to her character. Miss Van Ness testified that in the fall of 1855 Mrs. Cunningham, who was then boarding at 31 Bond Street, was very ill, and the witness was sent for. She went to Mrs. Cunningham's room. She testified as follows:

"Found Mrs. Cunningham in bed and Dr. Burdell sitting beside her. He did not wish any one to go in to disturb her, but Mrs. Cunningham said she would see the witness. The doctor said to witness: 'She must see you, although it is wrong; she is very low. *I would give my own life to save her, for she is the dearest woman I have ever known!*' This language only corresponded with what he had always said; he said he sat up night and day with her."

He introduced Mrs. Cunningham to such of his relatives as he was not on ill terms with. He went with her to visit his cousin, Mrs. Williams, in Brooklyn. Mrs. Cunningham attended social gatherings there with him, and visited with him at Mrs. Williams's house ten or twelve times in the fall of 1855 and the ensuing winter. He often, with her, visited the family of Mr. Frasier. Dr. W. B. Roberts, the social and confidential friend of Dr. Burdell, in his testimony said :

“ During the winter of 1855 and 1856 I saw the doctor and Mrs. Cunningham at several private houses, at the Broadway Theatre, and in the street very frequently together ever since my acquaintance with them ; when in the street I generally saw them walking arm-in-arm. In the summer of 1856, latter part of July, they went to Saratoga.

“ The private houses where I met Dr. Burdell and Mrs. Cunningham together were as respectable as any in the city.”

Everywhere among his friends and acquaintances he spoke of her in terms of admiration and exalted praise. He finally induced her to rent of him from the 1st of May, 1856, for one year, the portion of his house 31 Bond Street which he did not require for his own use. He made her his confidant in business matters. He entered into confidential business transactions with her. A judgment against his brother William had been assigned to him in blank by Edwards Pierrepont. He desired to push his brother hard for the payment of that judgment, but did not wish to proceed in his own name. He had her name written in the assignment which had been made to him in blank ; and, as a matter of form, took her promissory note as a consideration, so that he could proceed against William in her name. Mr. Sanxay, a well-known lawyer, who had been to a large extent his

legal adviser from 1846 up to the time of his death, testified that Dr. Burdell showed him the assignment in blank form from Mr. Pierrepont, and stated that he was going to assign it to Mrs. Cunningham. On this point Mr. Sanxay testified as follows:

"I expressed a great deal of surprise at this, from the fact that he had always spoken in denunciatory terms of the sex. * * * I inquired of him how he, who had denounced the sex so strongly, could ever have anything to do with them in a matter of this kind. He said that this lady was an exception to the general rule; *he had confidence in her, if he had in none other.* * * * She was a rich woman, a particular friend of his from Brooklyn, in whom he had the utmost confidence. * * * The general character of the conversation was that he had considerable money transactions with her."

Dr. Uhl testified that Dr. Burdell told him that at one time he had charge of Mrs. Cunningham's "property in Brooklyn, and knew all about it; that the property consisted of lots and houses, and would be very valuable."

Dr. Burdell induced Mrs. Cunningham to interest herself deeply in the welfare of his young cousin, Mrs. Dimis Vorce (her maiden name was Hubbard). She was young, and it was claimed that she had been badly treated by her husband. She desired to be divorced. Dr. Burdell, as he stated to Rev. Dr. Cox, obtained a divorce for her. He said it took him only six weeks from the time it was commenced to get a divorce, and that the man (her husband) was then away from the city. In the divorce suit, at Dr. Burdell's request, Mrs. Cunningham acted as her next friend, and gave a bond for payment of costs. Dr. Burdell paid the expenses of obtaining the divorce. Mrs. Wilson, a cousin of Dr. Burdell and a witness for contestants, testified:

“Mrs. Cunningham told me that she had interested herself very much for my cousin, Dimis Hubbard, and had been her next friend in her divorce ; thought very highly of her ; offered her a home in her family ; had treated her as a daughter ; would take her into her family and introduce her into the society her daughters kept. This was in the spring, just after she had taken the house ; she said she had taken the house solely on Dimis Hubbard’s account ; about that time Dimis Hubbard said to me that she wished the doctor would marry Mrs. Cunningham.”

Dr. Burdell and Dimis Hubbard commenced boarding with Mrs. Cunningham at the time she took the house 31 Bond Street, on the 1st of May, 1856. By the month of June, Mrs. Cunningham changed her opinion in regard to the youthful cousin of the doctor, whom, in the kindness of her heart, she had befriended and taken into her family. Shocked beyond measure at what she believed were the actual relations existing between Dr. Burdell and Dimis Hubbard, Mrs. Cunningham refused to permit her longer to remain under the same roof with her daughters and herself. Hannah Conlan, the cook, a witness for the contestants, testified :

“Mrs. Cunningham charged the doctor with having sexual intercourse with Miss Hubbard, and she said she should not be in the house where she was and her daughters ; the doctor never took Mrs. Cunningham out during the time Miss Hubbard was there, but always took Miss Hubbard out ; that was the first cause of the quarrel between the doctor and Mrs. Cunningham. Mrs. Cunningham did not allow the doctor to bring back Miss Hubbard to the house, but she came to visit the doctor to the time of his death ; she was there the day he was killed.”

Dr. Burdell, who up to this time, during his entire acquaintance with Mrs. Cunningham, had never spoken of her except in terms of respect, praise, and admiration,

now developed one of the strongest characteristics of his nature, and spoke of her alternately in terms of high praise and of foul abuse. Whatever the consequences, he could not dissuade her from the determination to protect her daughters from coming in contact with Dimis Hubbard. When she refused to permit this woman to remain in the house with her, why did not she herself leave the house, and break off all social and business relations with Dr. Burdell? Despite his faults, grievous as they were, from the first year of her husband's death they had been deeply in love. She had received his attentions openly and publicly. They were engaged; she had taken his house, by his earnest request, and, unless marriage followed, she would be compromised with her acquaintances and before the world. What more natural than that she should expel from her household the object of her jealousy, and keep on terms with him to whom she was affianced? So far as the moral perversity of his nature would permit, up to this time his deep attachment to her had been unswerving. It would seem that her influence over him must have had the effect to temporarily reclaim him from his immoralities, as well as to soften and humanize him. In order to understand the inconsistency of his course after this, in alternately praising and abusing her, his peculiar characteristics should be borne in mind. Dr. W. B. Roberts testified:

“When the doctor [Burdell] was angry with a person, no matter whether he was relative, friend, or foe, he would say anything to injure them; *he would be very friendly afterwards*; he was what I call a two-faced man.”

Mr. Sanxay, who had been his legal adviser for twelve years before his death, testified in regard to these peculiarities as follows:

"When the doctor was angry at a person he was the most vituperative man I ever knew, *and he did not hesitate to say anything, without any reference to it being true*, if he thought that it would be injurious to the person. I never had any difficulty with him ; he did not hesitate to denounce in the most unmeasured terms any person who he might imagine had injured him. He was quick-tempered and violent ; I have known him speak in terms of praise of an individual, then denounce him in a few days afterwards most bitterly, and then praise him again ; was very extravagant when he was praising or denouncing any one. I never heard any one so much abused by him as his relatives were. I never heard such bitter language used by anybody as he used towards his brother William and near relatives."

As far as appears in the evidence, the first time Dr. Burdell spoke ill of Mrs. Cunningham was in June, 1856, to his cousin, Mrs. Wilson, a witness for contestants. She testified as follows :

"Miss Dimis Hubbard, his cousin, said she was desirous that the doctor should marry Mrs. Cunningham.

"Q. 'Where was Dimis Hubbard living at this time?'

"A. 'With Mrs. Cunningham. I first heard her [Mrs. Cunningham's] name mentioned in Herkimer a year ago last New-Year. * * * The doctor first mentioned her name to me ; he said she was a very pleasant woman, and spoke very well of her.'

"Q. 'Did he speak very highly of her?'

"A. 'Yes.'

"Q. 'Did he tell you that she was a rich widow?'

"A. 'Yes. He said she was lady-like. Dr. Burdell spoke against Mrs. Cunningham in June, 1856. * * * He said that to have a public outbreak with her, he feared, would injure his business ; he said she was a cunning, intriguing woman, and that she would resort to anything to carry out her plans. Witness told him to get along with it as quietly as possible, and not to have any public outbreak.'

Mrs. Williams, another cousin of Dr. Burdell, testified that up to June, 1856, he spoke well of Mrs. Cunningham. He said she was a smart woman, and she told him she was worth one hundred thousand dollars. Dr. W. B. Roberts and Miss Van Ness testified that in July, 1856, Dr. Burdell went to Saratoga with Mrs. Cunningham and one of her daughters. Dr. Roberts and Miss Van Ness went with them. Dr. Burdell stayed at Congress Hall, and Mrs. Cunningham, her daughter, and Miss Van Ness stayed at Mr. Beecher's seminary. According to the evidence of Dr. Roberts and Miss Van Ness, Dr. Burdell was very attentive to Mrs. Cunningham, visited her at Dr. Beecher's seminary two or three times a day, and spent his evenings with her. Miss Van Ness testified that he was "very attentive and kind," just as she had "always seen him towards Mrs. Cunningham."

Rev. Luther F. Beecher testified that in June, 1856, Alexander Frasier introduced him to Dr. Burdell. Mr. Frasier said, referring to the school of the witness, "This is the place for those girls" [the daughters of Mrs. Cunningham]. Dr. Burdell concurred in the observation. Mr. Beecher continued his testimony as follows:

"Dr. Burdell replied that the person to whom he referred was a wealthy woman in New York, that she had two or three daughters, that everything was right, and he wanted me to give him a written statement, for he stated that the lady was particular in her method of business; this was about the 25th of June; before he left I gave him the written statement he required.

"Mrs. Cunningham came to Saratoga on the morning of the 26th of July [1856], and was introduced to me at the depot by Dr. Burdell, and she was put into the school carriage and sent up to the house; her daughter Augusta and Miss Van Ness were with her. Mrs. Cunningham remained there about three weeks, and Miss Van Ness about four

weeks, and the doctor a little longer still. * * * After the first daughter came and had been there one term, application was made to me to receive the second daughter, to which I assented."

In September, a month or two after the visit to Saratoga, Dr. Burdell, finding Mrs. Cunningham immovable in her hostility to Dimis Hubbard, determined to break his engagement of marriage, and, by means of a false and infamous criminal charge against her, to so enrage and humiliate her that she would be glad to cut loose from him on any terms. Pretending that the promissory note was gone, which she, as a matter of form, gave him as a consideration for the assignment to her of the judgment against his brother William, he charged her with stealing the note, and on the 20th of September brought in police officers to arrest her. When confronted with the charge, she acted as became an innocent and courageous woman. She denied the charge and denounced Dr. Burdell in vigorous language. She said she was "his wife by every tie that could be." Her language did not imply that there had been any formal marriage. The summons and complaint in an action by her against him for a breach of promise of marriage were already drawn. The complaint was verified by her four days before—namely, on the 16th day of September. Dr. Burdell must have been aware that if he did not fulfil his engagement to marry her she would commence and press the suit. The charge of theft was a desperate expedient to intimidate her from instituting the breach-of-promise case against him. The promissory note in question was of no practical importance. Dr. Burdell could have had the judgment against his brother William (as a nominal consideration for which the note was given) assigned to him or to any one he might name. Mrs. Cunningham sometime afterwards did assign the judgment to him.

The silly and outrageous scheme of Dr. Burdell to escape from his engagement of marriage with Mrs. Cunningham did not culminate as he expected. He having in such a villanous and dastardly way invoked the law, she determined that, in a straightforward, honorable manner, she would give him all the law he wanted. Driven to bay by him, her courage was more than a match for his cowardice. He adduced no proof of his charge of the theft of the note. She gave him an opportunity to prove it. She commenced an action for slander against him, and, as previously stated, he was held to bail in the sum of six thousand dollars. Her answer to his vile attempt to intimidate her was the commencement of the action against him for breach of promise of marriage, in which he was held to bail in the sum of six thousand dollars. He was fairly caught and firmly held in the trap he had set for his victim. Having basely attempted to degrade and ruin her, he was now brought face to face with his own prospective degradation and ruin, including loss of business and of reputation in the community. To Deputy Sheriff Crombey, who arrested him, he spoke of Mrs. Cunningham in the most degrading terms, and foully traduced her. In this he showed his craven cowardice, because he believed that the language he used would never come to the knowledge of his victim. To those of his friends who knew Mrs. Cunningham, at this very time he spoke of her in terms of the highest respect. To Dr. W. B. Roberts he acknowledged that he had done wrong. Dr. Roberts testified that Dr. Burdell said :

“He hoped to sink right through the floor if he had *ever said anything wrong of*, or done anything wrong to, Mrs. Cunningham ; that whatever he had said during the excitement he was going to take it all back.”

Dr. Burdell's special friend, Mr. Frasier, who went

bail for him, and to whom he unbosomed himself in these troubles, testified that, as far as he could remember, Dr. Burdell said nothing against Mrs. Cunningham. Dr. Burdell's friends, so far as he talked confidentially with them, advised him that these suits would be very injurious to him. Mr. Frasier said :

"I advised him to dispose of or settle the suits, and have no such suits over him. I said I thought it would be a great detriment to him to have suits of that nature hanging over him ; that whatever it might cost him he ought to get the suits out of the way."

Mr. Frasier testified that, at the request of Dr. Burdell, he called on Mrs. Cunningham to see if the suits could not be disposed of. He says she told him that "she would not settle except in an *honorable* manner ; that she *did not care for money*."

Dr. Burdell talked with Dr. W. B. Roberts on the subject, who testified as follows :

"The substance of a conversation with the doctor [Burdell] on or about the 18th of October, about the breach-of-promise suit, was this : I told him I was very sorry that such a suit should come to trial, for his conduct would appear so much against him in the eyes of a jury that they would award her at least six or eight thousand dollars damages. I advised him to settle. * * * He said he knew the circumstances were against him ; that he had been out a great deal with her, and that the Court would give a judgment against him."

Mr. Crombey, the Deputy-Sheriff who arrested him, testified that "he [Burdell] was afraid that the suits, if continued, would injure his business reputation, if public ; the matter *seemed to trouble him greatly*." Mr. Crombey also testified that Dr. Burdell "never had Counsel, nor manifested any intention of procuring legal assistance."

On the 22d of October the suits were discontinued by an agreement made by the parties themselves. No lawyers nor other persons were present. None but the parties had anything to do with the terms of this agreement. Mrs. Cunningham had told Mr. Frasier the only way she could settle—namely, in an “*honorable manner*”—which meant that Dr. Burdell should perform his promise to marry her. As she did not want his money, there was no other “*honorable*” manner of disposing of the breach-of-promise case. Dr. Burdell had told everybody that he would never marry. In respect to this declaration or avowal he had been with most of his acquaintances uniformly consistent. With regard to nothing else ever said by him, as far as the testimony showed, had he ever been consistent. One of his chief reasons for his determination not to marry was, he had no confidence in any of womankind. Mrs. Cunningham would accept no other arrangement than that of marriage. This he knew from his interview with Mr. Frasier. It was worse than idle for Dr. Burdell to talk with her about discontinuing the suits on any other basis. It is fair to infer from the undisputed facts and circumstances that he implored her to consent that their marriage should be kept secret until the following summer, when they would go to Europe, and after their return it would be an old story. Thus he would escape being laughed at and made an object of ridicule among his friends and acquaintances, whom he had so often, and for so long a time, told that he would never marry. He would be exposed to ridicule, not because he had married Mrs. Cunningham, but because he had married at all. He was peculiarly sensitive to ridicule. Censure and vituperation would disturb him far less. Therefore, not only on account of his relations with Dimis Hubbard, but that he might not become a laughing-stock among his acquaintances, he urged secrecy. The facts and circum-

stances point to the conclusion that Mrs. Cunningham, in the kindness of her heart and out of sheer compassion, yielded the point and consented to a secret marriage. In this she made a fearful mistake. Her generosity was thrown away on one who had been guilty of charging her in presence of police officers with being a thief. Had she been firm, Dr. Burdell would have consented that the marriage be public. Dr. E. L. Roberts, a witness for contestants testified that Mrs. Cunningham said, in speaking of Dr. Burdell's business matters, that :

"She knew that if she went on with the suits it would ruin him ; that the doctor felt very bad ; she was afraid he would go crazy ; that he cried, and she, out of pity, discontinued the suits."

Although to some persons Dr. Burdell asserted that the object of the breach-of-promise suit was to extort money from him, yet it was a conceded fact, established by the testimony on both sides, that upon the discontinuance of it no money was paid. Dr. Burdell told Dr. Roberts that "the suit was settled without any money ; that *it was not money she wanted.*"

Mr. Alexander Frasier testified as follows :

"I heard from the doctor [Burdell] that the suits were settled ; that he had not given her anything."

Dr. E. L. Roberts testified that when Dr. Burdell "spoke of the suits being settled, he said that it looked well on Mrs. Cunningham's part that *she did not want any money.*" While Dr. Burdell was thus explicit in stating that the breach-of-promise suit was not discontinued for any consideration of money, *he never would tell to any one on what terms it was disposed of.* Had he done so his great object in keeping the marriage secret until the following summer would have been defeated. There were but two ways of ending the breach-of-prom-

ise case—one by the payment of money ; the only other way was by marriage. In the latter way it was settled without the faintest shadow of doubt.

Six days after the suits were discontinued, he went out with Mrs. Cunningham for the first time in a long while. They, with Augusta Cunningham, went to the residence of Rev. Mr. Marvine, and the marriage ceremony was performed. It may be that on Dr. Burdell's part the marriage was compulsory. It may be that he consented to it because, in view of the suits that had been discontinued, but which could be renewed, the marriage was the only avenue of escape from impending ruin. It may be that he believed that afterwards he would be able to obtain a divorce with as much secrecy and speed as he had done in the case of Dimis Hubbard. It may be that he thought his marriage and divorce could be kept secret, so that most of his friends would never know that he had been married at all.

Before the solemnization of the marriage, on the 28th of October, he never took pains to affirm that he was not married to Mrs. Cunningham, or that he would not marry her ; but afterwards such declarations of his were somewhat frequent. Mrs. Wilson, his cousin, testified that in October and December, 1856, he told her that Mrs. Cunningham had asked him to marry her, but that he never would. Dr. Burdell said, "He would marry no one, and certainly not Mrs. Cunningham." Dr. E. L. Roberts testified :

"The doctor [Burdell] always said he would not marry any woman ; he said something to the effect that he would rather take the old woman than the young ladies of the family."

Although after the 28th of October Dr. Burdell generally denied that he was married, yet in some instances he admitted the fact of his marriage. Such was his in-

consistency. He was made up of rank and gross inconsistencies. In one instance, when he was desirous of selling 31 Bond Street in exchange for other property, and he was asked if he could give a good title, he said he was afraid his wife would not sign the deed.

From the summer of 1856 he alternately spoke well and ill of Mrs. Cunningham as the fit seized him, or according to the persons with whom he conversed. Sometimes he spoke of her in terms of coarse vituperation; at other times he referred to her in terms of highest praise. Miss Van Ness testified that "she never heard the doctor speak of Mrs. Cunningham except in the highest praise." Dr. W. B. Roberts, with whom Dr. Burdell was on terms of greater intimacy than with any one else, testified:

"In conversation with me he [Burdell] has *never* said anything derogatory of Mrs. Cunningham; he *always* spoke in the highest terms of her; and he was a man that *never spoke well of a lady except she deserved it very well.*"

Dr. E. L. Roberts testified:

"Before last fall [1856] he [Dr. Burdell] spoke of her [Mrs. Cunningham] in respectable terms; *more so than I ever heard him speak of a lady*; never heard him speak against her until after the lawsuits, and he never said anything very bad then."

Mrs. Dennison, a cousin of Dr. Burdell, testified that Dr. Burdell

"Spoke of her [Mrs. Cunningham] in the first place as being a very fine woman, a very able woman, and having a very fine family. * * * He said, after he got so he travelled with her she paid her own expenses. * * * He *always* spoke very kindly of Mrs. Cunningham and her family; he said she was a good mother and brought her children up well."

This witness attended a party of Mrs. Cunningham's on the 14th of January, 1857, the month before Dr. Burdell was killed. She brought Mrs. Cunningham some flowers for the party. Dr. Burdell did not attend the party, assigning as an excuse that he had not suitable clothes to wear. He, however, paid for the flowers which the witness had supplied. Mr. Sanxay, his legal adviser, with whom he often conversed with regard to Mrs. Cunningham, testified :

“Upon one occasion, when he was in my office, I jocosely said to him, ‘Harvey, that widow will get you. I guess you will have to marry her if you are not careful.’ He said he ‘might do worse.’ That was the last conversation I had with him concerning her. This was after the 1st of October, 1856. The doctor never spoke of her in my presence in any other terms than of respect.”

The fact that Dr. Burdell denied that he was married to Mrs. Cunningham was simply in keeping with his policy to have the marriage remain secret for a time. His denials no more disprove the fact of the marriage than his denials that she ever brought a breach-of-promise suit against him disprove the fact that such a suit was commenced. To several of his friends he asserted that there had been no such suit; but that the action was for breach of contract in regard to the lease of the house. Taking into view the peculiar character and make-up of Dr. Burdell, the facts and circumstances relating to himself and Mrs. Cunningham which transpired between the 28th of October, 1856, and the night of the 30th of January, 1857, when he was assassinated, were exactly those which would naturally be expected to occur in the case of such a secret marriage. These facts and circumstances were strong corroboration of the positive testimony of the marriage.

The most important evidence of contestants was that

by which they sought to show that Dr. Burdell could not have been the one who was married to Mrs. Cunningham at the residence of Rev. Mr. Marvine on the evening of the 28th of October, for the reason that he was elsewhere. The first attempt was to show that he was not in New York City at all on that day. So strong was the disproof of this theory that it was abandoned. The contestants claimed that they had shown by reliable evidence that Dr. Burdell was in Herkimer on the 25th, 26th, and 27th of October, 1856, and that he was not in New York City during those days. The contestants also sought to show that during the evening of the 28th of October, at the time the marriage ceremony was performed by the Rev. Mr. Marvine, Dr. Burdell was in Brooklyn. Eli Taylor, who kept the hotel at Herkimer, testified that Dr. Burdell arrived at the hotel on Saturday, the 25th of October, and remained there until three or four o'clock on the afternoon of the following Monday, when he took the train which left at that time. Christopher T. Wetherstein testified that he saw Dr. Burdell in Herkimer on the 25th of October, and had some conversation with him. A. S. Payn, a lawyer, testified that he saw Dr. Burdell in Herkimer, at Taylor's Hotel, on Sunday, the 26th of October. Samuel Earle, a lawyer (a brother of Judge Robert Earle), testified that he saw Dr. Burdell in Herkimer on Monday, the 27th of October, at his office and in Taylor's Hotel. Robert Earle (then County Judge of Herkimer, afterwards for more than twenty years a Judge of the Court of Appeals) testified that he saw Dr. Burdell in Herkimer on the 27th of October. Mrs. Mary Wilson, a cousin of Dr. Burdell, testified that she saw him at her house in Herkimer on Saturday, Sunday, and Monday—the 25th, the 26th, and the 27th of October, 1856.

All these witnesses made a mistake of one month. The evidence of all of them related to one and the same visit

of Dr. Burdell in Herkimer. Eli Taylor stated that Dr. Burdell, when he arrived on Saturday, said he expected to meet Mrs. Wilson on board the boat that came from New York. Mrs. Wilson herself testified that it was on the last Saturday in *November* that she left New York for Herkimer, and *on that occasion Dr. Burdell expected to meet her on the boat.* Dr. Burdell was in Herkimer at the last-mentioned time on business, and arrived there on that Saturday—the 29th of November. He had no business in Herkimer on the 25th, 26th, and 27th of October; and it was not pretended that he transacted any business there at that time. Eli Taylor was in Herkimer when Dr. Burdell arrived at his hotel the last Saturday in November; but at the time he (Eli Taylor) testified that Dr. Burdell was in Herkimer—the 25th, the 26th, and the 27th of October—he (*Eli Taylor*) *was in New York*, visiting his brother, Elias Taylor, according to the evidence of the latter, who fixed the date by his daughter's death and a visit he and his brother made to her grave. Mr. Laffin, a resident of Herkimer, who was well acquainted with Dr. Burdell, left Herkimer for New York in the train Dr. Burdell would have taken had the Herkimer testimony been correct. He did not see Dr. Burdell on the train. These circumstances were quite sufficient to show that the Herkimer witnesses made a mistake of one month. It was proven by the testimony of eleven witnesses of the highest respectability, who could not be mistaken, that Dr. Burdell was in New York City on the 25th, 26th, and 27th of October, 1856. During that period he had important business in New York, requiring his personal attention, while, as already stated, he had no business of any kind to call him to Herkimer.

Three witnesses for contestants testified that Dr. Burdell was in Brooklyn Tuesday evening, the 28th of October, at the time the marriage ceremony was

performed by the Rev. Mr. Marvine. Facts and circumstances developed on the cross-examination showed clearly that these witnesses were entirely wrong in respect to the date of Dr. Burdell's visit to Brooklyn. According to the evidence of these witnesses, Dr. Burdell on that occasion spoke of having just returned from Herkimer. As he did not go to Herkimer at all in the month of October, but did go there the last of November following, the testimony as to the Brooklyn *alibi* broke down and failed to weaken in the least the positive testimony that Dr. Burdell was married to Mrs. Cunningham upon the 28th of October. Upon any fair construction of the evidence, the genuineness of the marriage was clearly and conclusively established.

On the 18th of June the testimony was closed on both sides; and on the 30th of June and the 1st of July the case was argued before the Surrogate by Counsel on both sides. The principal argument on behalf of the contestants was made by Mr. Tilden; and the principal argument on the part of the claimant was made by Mr. Clinton. An outline of Mr. Clinton's argument is published in the report of the case (*Cunningham v. Burdell*), 4 Bradford's Reports, pp. 343-378.

CHAPTER XVII

CUNNINGHAM-BURDELL BOGUS-BABY CASE

Astounding Disclosures.

AFTER the case was argued and submitted to the Surrogate, Mr. Clinton was very glad to take his summer vacation. He went to Sharon Springs, and returned to New York on the 4th of August. The next morning, with indescribable amazement and unutterable disgust, he read the following article, which appeared in the New York *Daily Times* of August 5, 1857:

“Public excitement about the great Burdell mystery—almost dead through lapse of time and lack of interest—was revived yesterday with tenfold vigor. Mrs. Cunningham rearrested! Why? When? How? Has there been another murder, or has the veil been lifted at last from that unparalleled tragedy for which Emma Augusta Cunningham was tried and acquitted? How is it that she was again arrested? The *Times* first announced the fact, and people rushed to the *Times* for the particulars.

“It will be remembered that shortly after the conclusion of the trial of Mrs. Cunningham for murder a rumor prevailed that she was with child by Dr. Burdell, and that in due time a living pledge of the union would be produced. The rumor was not traced to any direct source, and was not generally believed until her Counsel, Judge Dean, in concluding his speech before the Surrogate, on July 2, used the following language, as appears from the *Times's* report of the following day:

“‘*If it were true that in the ordinary course of gestation a*

child should be born to Harvey Burdell, then not only all the ties of blood and nature, but all the dictates of humanity, demanded that the Court should lean in favor of that *innocent, unborn child* rather than in favor of those who have no *direct* claim upon the property. He would say nothing of the consequences of a decree of bastardy in advance. With consequences we have now nothing to do,' etc.

"This announcement was, however, received as authoritative that Mrs. Cunningham was *enciente*, and as she soon after began to appear in public, it was noticed that her form gave corroborating evidences of the probabilities outlined by the learned Judge, her Counsel.

"A few days after this public announcement of 'contingencies'—this 'casting of shadows'—Dr. Uhl was sent for by Mrs. Cunningham to wait upon her. Dr. Uhl had been her medical adviser previous to the date of the murder, had attended her during the inquest, and was a prominent witness in the three investigations which grew out of the murder and the claim for the property. Dr. Uhl accordingly went to see her, and was by her informed that she was *enciente* by Dr. Burdell, and expected to be confined about the middle of August. She asked him to become one of her medical attendants upon the *accouchement*, and Dr. Uhl consented. In a few days he called again and advised with her about her condition. Upon pressing some certain medical inquiries, his suspicions became aroused. Up to this time Dr. Uhl had rather favored the idea that Mrs. Cunningham was entirely innocent of the charge of murder. He visited her again, and his doubts about her 'interesting situation' became almost certainties. He immediately laid the matter before David E. Wheeler, Esq., his Counsel, who directly told him it was his duty to go to District Attorney Hall and make a necessary affidavit. Dr. Uhl then called on Mr. Hall—this was about the date of July 10—and stated the facts, asserting, however, that he would not make an affidavit, as he did not wish his professional delicacy or confidence to be at issue. Mr. Hall told him that if such a thing was contemplated by Mrs. Cunningham it was a very serious felony, and referred

the doctor to that section of the Revised Statutes which says :

“Every person who shall fraudulently produce an infant, falsely pretending it to have been born of parents whose child would be entitled to a share of any personal estate, or to inherit any real estate with the intent of intercepting the inheritance of any such real estate, or the distribution of any such personal property from any person lawfully entitled thereto, shall, upon conviction, be punished by imprisonment in a State Prison not exceeding ten years.’

“Mr. Hall further argued with the doctor that he might have it in his power to frustrate the crime or prevent it from being an undiscovered mystery ; that under the strange circumstances surrounding this woman, and her world-wide notoriety, and the unfortunate results which might flow to the community if her crimes should baffle detection, it was the duty of every man to do all in his power to thoroughly expose her. Dr. Uhl said he would reflect upon the matter. He did so, and on the following day told Mr. Hall that he would place himself entirely at his disposal and at the disposal of the authorities, and engage in any plan which Mr. Hall might project. The advice of the District Attorney was that he should go, and, concealing his doubts and suspicions, learn from Mrs. Cunningham her full views and arrangements. Upon another interview Mrs. Cunningham admitted to Dr. Uhl that the approaching confinement was a humbug and ‘the unborn child’ a myth, and offered him one thousand dollars if he would undertake the job of providing a child and assisting at the ‘*accouchement*’ ; whereupon Dr. Uhl apparently assented, and, returning to the District Attorney, reported. The latter functionary said he had a great many things on his hands, that these things worried him more or less, and that therefore the sooner the crisis was reached the better. He then laid down this plan: That Dr. Uhl should invent the fable of a California widow for a patient, whose husband being away, had been indiscreet, and was ready to present her lord with a ‘responsibility’ for which, in law, he was not responsible ; that be-

ing sent for to go to California, she was as anxious to bestow it upon any of those kind ladies who are perpetually advertising for 'infants to adopt,' and was anxious to conceal her shame, as any lady might be, to be sure that the 'real mother' was never to 'turn up,' like Pillicoddy's wife, and reclaim the lost heir. This mystical matter was to be located near by, in Elm Street; that on any convenient day a child should be 'borrowed' for a few hours from Bellevue Hospital and sent for to the Elm Street place of refuge of the distressed California widow by Mrs. Cunningham; that the latter should be in travail for a few hours, and then, while in possession of the 'little stranger,' suddenly be restored to a delighted convalescence, with a variety of minor dramatic touches (for which the District Attorney is said to be famous) not necessary now to be mentioned.

"The plan was given to Mrs. Cunningham, who was highly pleased with it, and became impatient for the *dé-nouement*. Dr. Uhl asked her when it would be most convenient for her to become a mother. Thursday, July 28th, was the shortest time for the 'ordinary gestation' (as spoken of by Judge Dean) under the theory of the marriage before the Surrogate, and so the first week in August became the settled-upon time. On the first day of August Mr. Hall found it necessary to find another physician, who should take care of the child and care for its health while it was in a state of loan, and also to obtain the infant. He sent for his most intimate friend and his own personal physician, Dr. De La Montagnie, of Fishkill, and also for Governor Washington Smith and George Kellock, of the Almshouse, and to them confided his plans. The doctor promised to lend his aid, and came down to New York for that purpose. Governor Smith, with District Attorney Hall, had an interview with Mr. Warden Daly, of the Bellevue Hospital, on Monday last, and examined into the state of the lying-in ward. It was found favorable. The child would be forthcoming.

"Dr. Uhl and Dr. De La Montagnie were then brought together by Mr. Hall at his office, and, after a consultation,

they started out to find fitting apartments whereto might come the messenger of Mrs. Cunningham with a basket, and wherein (in the apartments, and not the basket) the mythical widow of California was to reside. Elm Street was found to be particularly full of 'apartments,' but there were none private enough except some in the house of Mr. * * * *, a lager-beer gentleman of No. 190 Elm Street. Dr. De La Montagnie being unprovided with baggage, Mr. Hall lent him one of his wife's trunks, marked 'K. L. H.,' which rendered necessary (lest suspicion being excited by the inmates, they might impart it to the bearer of the child when she should make her appearance, basket in hand) the taking of a name corresponding to the initials. The name selected was 'Karl L. Herwig.' It may be here remarked that the doctor from Dutchess County has a remarkably German appearance, and will do credit to the Saxon race anywhere. A card with that name upon it was given to the worthy host of No. 190 Elm Street, rooms were selected, and by twelve o'clock, noon, of Monday, August 3d, the first act of the drama of 'My Little Adopted' was over.

"The *dénouement* of this strange story now rapidly approaches.

"It was necessary to furnish the room in Elm Street, for it was probable that a messenger from Mrs. Cunningham might come to see it. Accordingly the District Attorney sent from his residence a cart-load of *olla podrida* furniture, of which the inventory is something like the following: One sofa-bedstead, one round table, one rocking-chair, one roll of carpeting, five plain chairs, looking-glass, crockery, candle, matches, nursing-bottle, one trunk, marked 'K. L. H.,' containing bedding and pillows, etc. It arrived, and was sent to the room a few minutes before Mrs. Cunningham, in person, walked past to take a survey! She found it all satisfactory. Pending the despatch of the furniture, Dr. De La Montagnie proceeded to Bellevue in a coach, removed the child in its *hospital clothes*, accompanied by a nurse, named Mary Regan, for the occasion. The child—a female one—is the daughter of a poor woman in the hospital, named Mrs.

Elizabeth Ann Anderson, and was born about ten or eleven o'clock last Saturday morning. Dr. De La Montagnie arrived at the house No. 190 Elm Street about half-past eight o'clock on Monday. In the meantime the furniture had been put in place, and a gentleman in the vicinity went to bed as the afflicted widow, in case Mrs. C.'s messenger insisted upon seeing the *bona-fide* lady. Thus all was arranged, including a basket belonging to Mr. Hall, with a neat pillow in it, ready for conveyance of the *petite enfant*.

"Inspectors Speight, of the Twenty-first; Dilks, of the Fifteenth; and Hopkins, of the Third precincts, had been selected to take charge of the police arrangements; also patrolmen Walsh, S. J. Smith, and Wilson, of the Fifteenth. Just after dusk on Monday evening the patrolmen were at the station-house. Inspector Hopkins was on the watch at the alley-way leading from the rear of No. 31 Bond Street into Bleecker Street. Inspector Speight stationed himself in Bond Street, to watch outgoings and incomings. Inspector Dilks selected the front of Burton's Theatre as his place of surveillance. Shortly afterwards Officer Walsh was sent to No. 190 Elm Street to watch, and Sergeant Smith brought to Burton's.

"About nine o'clock Inspector Speight saw a female come out of the house No. 31 Bond Street, dressed in darkish clothes and a hood. She proceeded to the Bowery and got into a down-going car. Inspector Speight also got in. While there a friend came to him and said, 'There is Mrs. Cunningham,' pointing to the lady who had emerged from No. 31 Bond Street. The Inspector turned it off, and no more was said. At the corner of Broome and Marion streets she got out. Mr. Speight tarried on the car half a block and then doubled and succeeded in seeing her enter No. 190 Elm Street.

"She soon came up-stairs and presented herself at the door. She contented herself with looking in the room merely. There were terrific moanings heard from the inside room, caused by the pains of the afflicted 'paternal'

mother, and the basket was delivered and taken out. So quick were her motions that Officer Walsh, in the obscurity, just missed her, but followed into the Bowery with Dr. Montagnie. The doctor came close to her, but could not see her face. He, however, distinctly recognized the basket as the one brought from Mr. Hall's house, and the one last seen in No. 190 Elm Street. She turned into Bond Street, and re-entered No 31 Bond Street, seen by both Dr. Montagnie and Inspector Speight and Patrolman Walsh, carrying the basket.

"A messenger was observed to go to Dr. Uhl's house from No. 31 Bond Street about half-past nine o'clock on Monday evening in a great hurry. Patrolman Matthews, of the Twenty-first Precinct, had been sent to Brooklyn to watch Dr. Catlin (the physician, it will be remembered, who swore on the trial to Mrs. Cunningham's rheumatism). About half-past ten o'clock both physicians entered, and in due form Mrs. Cunningham was 'brought to bed.' A fictitious after-birth had been prepared and a large pailful of lamb's blood. The bloody sheets of Mrs. Cunningham's bed and the placenta, stowed away in the cupboard, completed this mock confinement, which had also been systematically accompanied with imaginary pains of labor.

"Mrs. Cunningham, however, despite her illness, arose from her bed to partake of a delicate lunch, and then went back again. Dr. Uhl left first, and, rejoining the police, informed them how the land lay. Soon after Dr. Catlin left, and was arrested by Patrolman Wilson as he was turning the corner of the Bowery, and taken to the station-house.

"Inspector Dilks, accompanied by Dr. Montagnie as a physician, then went to No. 31, under and by virtue of that section of the Metropolitan Police Act which authorizes Inspectors at all hours of the day and night to enter any house wherein they have reason to believe a felony is being committed. They rang at the door, and were admitted. Objection being made to their going up, Inspector Dilks courteously said he had been informed by a physician that there had been a birth of a child under curious circumstances,

and it was his duty to inquire. They advanced up-stairs, preceded by the 'two ladies'—one being an aunt of Mrs. Cunningham and the other a nurse. The room in which Mrs. Cunningham was 'confined' was the second-story front room—the same in which Dr. Burdell was laid out for his funeral, and which he occupied as a bedroom in his lifetime. The back room—where the murder was committed—had been newly papered and painted, and was set out for a lunch.

"As Dr. Montagnie and Inspector Dilks were entering, one of the nurses said, 'Here are some gentlemen who wish to come in.' Instantly her voice was heard saying, quickly, 'Shut the door, don't let them come in here.' But Dr. Montagnie and Mr. Dilks entered and made known their business. The child was found lying very sweetly asleep by her side, and was unmistakably the child taken from Bellevue and delivered to Mrs. Cunningham in Elm Street. It may be here stated that the child was marked with lunar caustic in the armpits, on each ear, and a new string, capable of being identified, tied about the navel. On being examined, the string was also found, but, of course, the lunar caustic marks will not be found visible for a day or two.

"The officers, with the District Attorney, now came up. Mr. Hall was apprehensive that, when discovered, Mrs. Cunningham might attempt to kill the child, and Inspector Dilks therefore immediately proceeded to take it away from her. She resisted, speaking of it as 'her dear baby.' 'Don't touch my baby'; and, addressing Dr. Montagnie and others, said, distinctly, '*This is the child of Harvey Burdell.*'

"Dr. Montagnie and Mr. Hall now leave No. 31 Bond Street, and, taking the child with them, return it to its mother, Mrs. Elizabeth Ann Anderson, in Bellevue Hospital. The hospital clothes, which were found in Mrs. Cunningham's house, and which the child wore when removed from Elm Street, *having been changed by Mrs. Cunningham for new and costly garments*, its mother returns thanks for the exchange.

"Yesterday Mrs. Cunningham, Dr. Catlin, '*accoucheur*,' and

the midwife were arrested for the felony, under the statute of falsely pretending that Mrs. C. had given birth to a child who would be entitled to inherit the property of the late Harvey Burdell.

“And thus this strange, eventful history closes for the present. We have given above a mere outline of the plot and its *dénouement*—of minute particulars, the by-play of the drama, the reader will find enough in the affidavits, sketches, scenes, and incidents we publish below.”

Mr. Clinton and ex-Judge Dean promptly refused to act as Counsel for Mrs. Cunningham in this bogus-baby case.

In the New York *Herald* of August 6, 1857, Mr. Clinton's position was correctly stated as follows:

“Mr. Clinton returned to the city on Monday last from Sharon Springs, Schoharie County, New York, where he had been rusticated for a little while. He states that he understood from Mrs. Cunningham, some months ago, that she was *enciente*, but he has never spoken one word on the subject on any occasion. In the murder trial, and in the case before the Surrogate, he considered it a matter entirely independent of those cases, and, consequently, made no reference to it. It was a contingency which he thought it would be time enough to notice when it really came to pass. He had seen Mrs. Cunningham very little during the last two or three months, and not at all during the last month. Her legal causes did not require him to see her more during that time. He still implicitly believes that she was married to Dr. Burdell. * * *

“Mr. Clinton does not consider himself Mrs. Cunningham's Counsel in the present case; he will not, under any considerations, act as such; but as regards the case before the Surrogate, having been committed to that, he will continue to act as Counsel for the claimant when such action is required. If the statements which have appeared in the newspapers in regard to the late criminal attempt of Mrs.

Cunningham prove to be correct, Mr. Clinton says he will not act as Counsel for Mrs. Cunningham in any cause or causes under any inducement whatever."

The Police Justice upon whose warrant Mrs. Cunningham was arrested committed her for trial and refused bail. On the 12th of August, eight days after her arrest, a motion to admit her to bail was made by Mr. Stafford, her Counsel, before Judge Daly, of the Court of Common Pleas in New York, the case having been brought before him by a writ of *certiorari*. Judge Daly denied the motion. Afterwards, and on the same day, Mr. Stafford made a motion to admit her to bail in the New York General Sessions, before Recorder James M. Smith, which motion was promptly denied. In the course of the discussion the following occurred, as appears by the report in the New York *Daily Times* of August 12, 1857:

"Mr. Stafford contended that no offence had been shown to be committed by Mrs. Burdell, even if it were attempted. The Recorder replied that it might with equal propriety be said that if a man discharged a pistol at another, and the ball missed its aim, no offence had been committed, although one had been attempted.

"‘Or,’ added Mr. Hall, ‘if a man were caught in a store, with goods ready for removal, if they were not removed, he has committed no offence.’

"‘Then,’ said Mr. Stafford, ‘I understand that your Hon-
or denies the motion.’

"*The Recorder*. ‘I do, most decidedly.’"

Afterwards, on the 1st of September, upon a writ of *habeas corpus*, directed to John Gray, Warden of the City Prison (otherwise called the Tombs), Mrs. Cunningham was brought before Judge Peabody, of the Supreme Court, and a motion, for the fourth time, was made to admit her to bail. The motion this time, al-

though earnestly and persistently opposed by the District Attorney, was successful. Judge Peabody, upon granting the motion, delivered a very able and well-reasoned opinion, in the course of which he showed very clearly that, assuming the facts to be as stated by the prosecution, no offence in law had been committed. The case is reported as *People v. Cunningham*, 3d Parker's Criminal Reports, 520.

The section of the statute on which the criminal accusation was based reads as follows :

“Every person who shall fraudulently produce an infant, falsely pretending it to have been born of parents whose child would be entitled to a share of any personal estate, or to inherit any real estate, with the intent of intercepting the inheritance of any such real estate or the distribution of any such personal property from any person lawfully entitled thereto, shall, upon conviction, be punished by imprisonment in a State Prison not exceeding ten years.”

The fraudulent production of an infant referred to in this section must be in connection with some steps taken in Court, or before some Judge having the requisite jurisdiction to enforce the alleged legal rights of such infant ; and the legal proceedings so taken must be such as would, if successful, intercept or tend to intercept the inheritance or the distribution of personal property from those “lawfully entitled thereto.” What was said and done by Mrs. Cunningham at 31 Bond Street, assuming the allegations of the prosecution to be true, could not be of the slightest consequence so far as the criminal law was concerned.

Judge Peabody, in his opinion, says :

“Was the production of this child, under the circumstances, a fraud in law ? * * * Who was, by the production of the child, defrauded, or attempted to be defrauded ? Was it Dr. Montagnie or Inspector Speight or Inspector Dilks, the

persons to whom she said, in answer to their inquiries, that it was her child? * * * But she had made no statement or claim respecting it, except to answer certain questions proposed to her; and if she had then proclaimed that it was the offspring of herself and Dr. Burdell, I do not see that it would be material.

* * * * *

“Would a child of the parents of whom she pretended it was born—that is, of herself and Dr. Burdell—be entitled to inherit? There is no evidence or claim that it would.

* * * * *

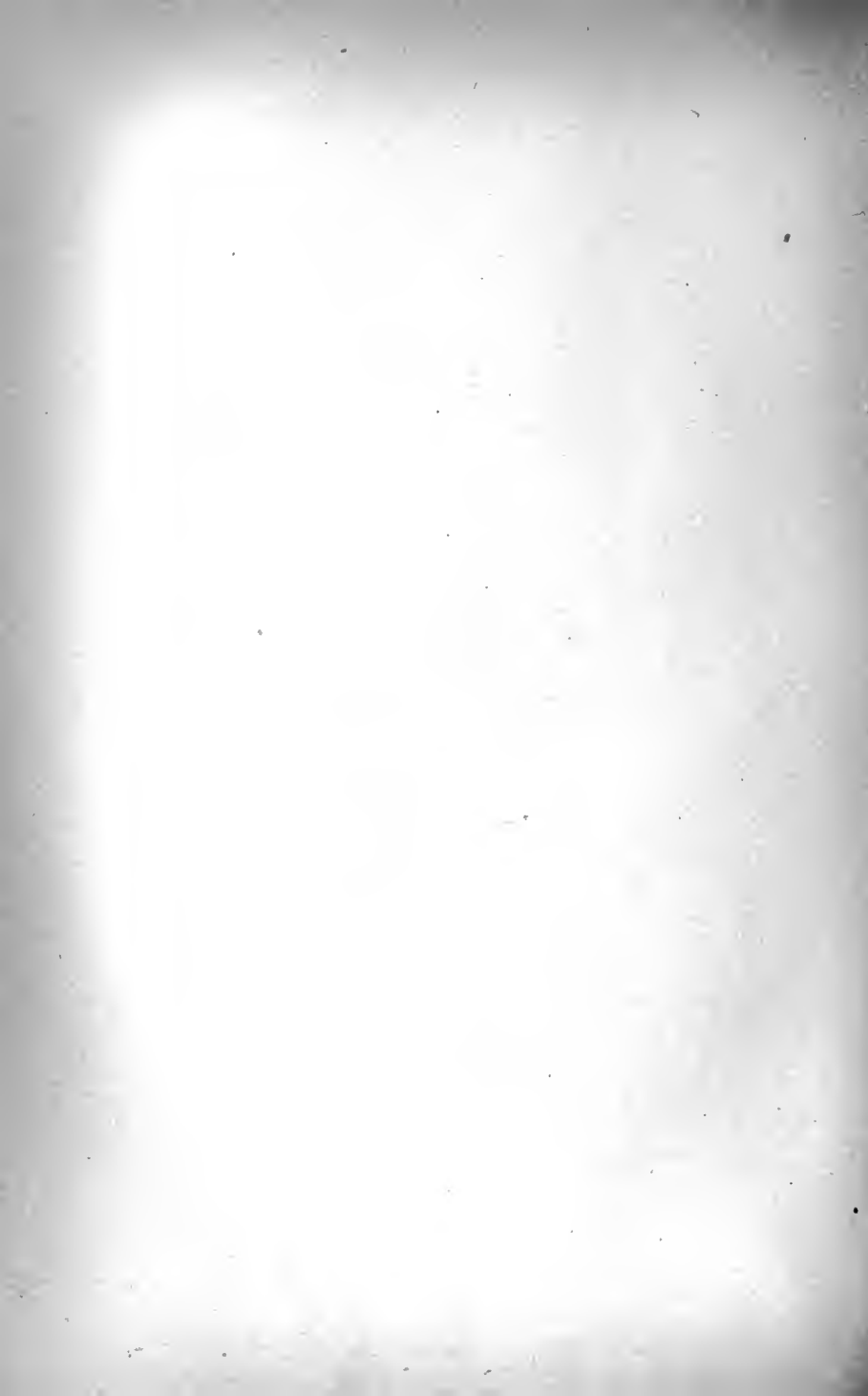
“Her previous claim in that respect is the only evidence of the fact. * * * There is no evidence that it would, however, and I think the case not without difficulty at this point. The production of a child, pretending it to have been born of parents whose child, it is pretended, would be entitled to inherit, is not the crime described in the statute. The pretended offspring of a pretended marriage is not the child whose production is so severely punished.

* * * * *

“Was it her intent by this production to intercept the inheritance? The fraudulent production, the false pretence that it is born of parents whose child would be entitled to inherit, and the intent to intercept the inheritance, must unite to constitute the crime: We will assume that there was the fraudulent production and the false pretence as to its birth. What intention was there by that production and false pretence, at that particular time and place, to intercept the inheritance? Was there the intent, by the act accompanying it, which is requisite to constitute the crime? Was not all this seen in contemplation of, and preparatory to, acts intended to be performed at a future time, which acts would probably (had they been realized) have constituted the offence which the statute designed to punish? This statute has never received a judicial construction, that I am aware of, and no analogies for its construction have been suggested.”



HON. CHARLES A. PEABODY
Judge of New York Supreme Court



Near the close of his opinion, Judge Peabody, in his straightforward, bold, manly fashion, says :

“Perhaps no occurrence within our time has so electrified society, throughout all ranks and classes, as this, and the one shortly preceding it, with which, in the public mind, this unfortunate accused was also associated, and certainly no person under suspicion was ever more remorselessly dealt with by public opinion ; and it is not remarkable that under the influence of the prevailing sentiment, by which every one must be affected in a greater or less degree, it should have been difficult to convince a conscientious and enlightened Judge that it was safe and proper to admit her to bail ; but now that the lapse of time has allowed the tempest of public feeling to subside, it would be not a little remarkable if a magistrate should be found to adjudge, upon all the circumstances of this case, that no amount of bail would render her production for trial reasonably secure.”

After referring to the injustice sometimes done outside forms of law in obedience to public opinion, Judge Peabody observes :

“The same amount of injustice perpetrated in the name and under the forms of legal justice, would go further to undermine and break down society, because it would assume the livery and feign the sanctity of judicial enactment.

“My conclusion is that the ends of public justice will be answered by admitting the prisoner to bail in the sum of five thousand dollars.”

Mrs. Cunningham at once gave bail, and was set at liberty on the 10th of September. The attempt to deprive her of bail pending her trial upon a criminal charge which had no legal foundation did not stop here. The District Attorney took an appeal from the decision of Judge Peabody and carried the case to the General Term of the Supreme Court by writ of *certio*-

rari. The case is reported in 3d Parker's Criminal Reports, 531. That Court reversed the decision of Judge Peabody, on the ground that the question of bail in the case was *res adjudicata* when the case was before him. The Court actually held that inasmuch as the Police Justice and the Court of General Sessions had refused bail, a Supreme Court Judge had no power to admit to bail. It was even held that had there been only the refusal of the Police Justice to allow bail, a Supreme Court Judge would have been without any power in the premises. Such a doctrine is monstrous, and the decision has not been followed. The question of bail is one of sound discretion, to which the doctrine of *res adjudicata* should have no application. Bail in bailable cases is a matter of discretion. The propriety of granting or refusing bail in bailable cases may, and often does, change from day to day and from hour to hour. The doctrine that the decision of a question of bail, given hastily, and perhaps thoughtlessly, by a Police Justice, who is generally not a lawyer, is *res adjudicata*, is abhorrent to the principles of sound law. However, the attempt to renew the incarceration of Mrs. Cunningham, upon a criminal charge which had no foundation except in the somewhat bewildered imagination of the District Attorney, did not succeed. Although, in order to achieve the result, he had succeeded in securing a decision from the General Term of the Supreme Court in favor of bad law of the worst kind, yet that Court held that the General Term had a right to order that Mrs. Cunningham be admitted to bail; and, in the proper exercise of their discretionary power, this was done, and new bail was given. The prosecution afterwards abandoned the case, and Mrs. Cunningham was never brought to trial.

CHAPTER XVIII

CUNNINGHAM-BURDELL CASE BEFORE THE SURROGATE

Mr. Clinton's Review of the Decision of the Surrogate Against the Validity of the Marriage.

WHEN the trial of the preliminary issue before the Surrogate was closed and the case finally submitted to him, Mr. Clinton had no doubt that his decision would be in favor of the claimant. Although the exposures in regard to the production of a fraudulent heir, in a legal point of view, had nothing to do with the proceedings before the Surrogate, yet it seemed to Mr. Clinton that human nature was such—judicial nature was such—that it would be impossible for the Surrogate to prevent his mind being poisoned against the claimant, and that he could not avoid believing that one who was guilty of concocting, or attempting to execute, a scheme to produce a false heir was capable of planning and taking part in a fraudulent marriage. No reflection is intended upon Surrogate Bradford. He was one of the ablest, purest, and best of judges. When he read the newspapers he could no more prevent their poisonous effect upon his mind with reference to the claimant than he could, if struck by lightning, escape the consequences. In public estimation, the ruin of Mrs. Cunningham, commenced by Dr. Burdell, was effectually completed under the auspices of Dr. Uhl. In regard to the part taken by Dr. Uhl, the confidential and family physician, there could be but one opinion. Had he used his influence to dissuade her from any such monstrous scheme, his course

would have been honorable; but to encourage and aid her in it, and then betray her, entitled him to the execration of the whole community.

That Dr. Burdell and Mrs. Cunningham were married on the 28th of October, 1856, by Rev. Mr. Marvine, has always been Mr. Clinton's firm belief. Although forty years have passed since the decision of the Surrogate, Mr. Clinton has never seen, read, nor heard anything to shake his belief in the slightest degree. On the 24th of August, while the claimant was incarcerated in the Tombs and bail had been refused, the Surrogate rendered his decision, holding that Dr. Burdell was never married to her, and refusing to issue to her letters of administration. The opinion of the Surrogate in favor of contestants (reported in 4th Bradford's Reports, pp. 454-502), on its face, to one unacquainted with the testimony adduced before him, seems to be thorough, able, candid, and fair—indeed, a luminous exposition of the law and the facts of the case. Yet, on a close scrutiny, the very opposite will be apparent. As a pure and upright judge, he doubtless strove to the utmost against being influenced by the exposures in the "Bogus-baby Case." Yet the effect on his mind was like that which one sometimes experiences in getting "turned around" with reference to the points of the compass; so that north, south, east, and west seem exactly opposite to where they really are. Sometimes in entering a city or town one gets "turned around," and remains so until he leaves the place. It was so with the Surrogate in his opinion. He was "turned around" when he began to write it, and he continued so until he had finished. So far as any law or principles of evidence underlying his opinion are concerned, he applied them one way for the contestants and the opposite way for the claimant. The inconsistencies, which appear on a careful examination of the opinion, are remarkable. His misconceptions

of evidence, and his erroneous deductions from evidence fairly stated by him, are startling. A few examples will suffice.

He held that the evidence of the six witnesses, on which it was sought to be shown that Dr. Burdell was in Herkimer on the 25th, 26th, and 27th of October, 1856, was reliable, and that the witnesses could not have been mistaken, when it was clear, upon the undisputed facts, that they were mistaken. Although it was shown by the evidence of eleven witnesses of the highest respectability, whose integrity was not questioned, that Dr. Burdell was in New York City during those days, and was not, and could not have been, in Herkimer, and the evidence of these witnesses was corroborated by various events and circumstances, with some of whom Dr. Burdell had important business at the time, which required his personal presence in New York (he having no business to call him to Herkimer during the same period), the Surrogate held that the evidence of the six witnesses, contradicted by facts to which they themselves testified, should prevail over the testimony of eleven witnesses, corroborated as they were by undisputed facts, and who for various business and other reasons could not have been mistaken.

Rev. Mr. Marvine having testified, in substance, that the corpse of Dr. Burdell was that of the man whom he married to Mrs. Cunningham, and that on this point he had no doubt whatever, the Surrogate discredited his evidence in a manner not only fallacious but grossly unjust. The Surrogate said :

“He [Mr. Marvine] was taken to see the corpse [at the Coroner’s inquest], and was then requested to state whether that was the body of the man he had married.

* * * * *

“It is enough, in my judgment, that Mr. Marvine did not

recognize the man affirmatively when he was invoked to test that very question. That was the whole object of his examination of the corpse."

Mr. Marvine was at the time told over and over again that Eckel was the man he married. He was given to understand that Eckel and Dr. Burdell bore such a striking resemblance to each other that any one might mistake one for the other. The fact was that Mr. Marvine, as soon as he saw the corpse, did recognize it as that of the man whom he had married. Jerome B. Fellows, a merchant, testified that he was at the Coroner's inquest when Mr. Marvine was there. He testified as follows:

"Mr. Marvine was talking about the murder, and I stood listening; after he got through, I asked him whether or not it was Dr. Burdell that he married, and he told me that he was as positive as he could be that it was Dr. Burdell, but, at the same time, if Eckel was a similar-looking man, it might be doubtful."

John McCluskey, a policeman attached to the Coroner's office, testified that he was at 31 Bond Street when Rev. Mr. Marvine came to see if he could recognize the corpse of Dr. Burdell. He testified as follows:

"I saw him [Mr. Marvine] when he came in with the Coroner. The Coroner asked Mr. Marvine in the front room, where the body lay, if it was the man he married. Mr. Marvine looked at the body, and said he thought it was. The Coroner told him he would like to have a direct answer from him—'Yes or No.' He said he would not like to be positive, and that the more he looked at him he was impressed that it was the man he married. The Coroner told him of the solemn obligation he was under, and he said, 'I don't know how to answer you unless I say this—to the best of my opinion that is the man I married.'"

Before the Coroner, Mr. Marvine was not asked to

state his opinion as to whether the corpse was that of Dr. Burdell. In respect to his evidence before the Coroner, Mr. Marvine testified :

"I did not say [that is, in his testimony] I recognized the body, not in those words. * * * *For they asked me no question to lead to such a remark.*"

From the talk about the great resemblance between Eckel and Burdell, Mr. Marvine might have thought it was as difficult to identify one from the other as it is sometimes in the case of twins. Mr. Marvine's caution in desiring to see Eckel seems to have discredited his evidence in the opinion of the Surrogate. Shortly afterwards, having seen Eckel in the meantime, Mr. Marvine testified in substance before the Grand Jury that Dr. Burdell was the man whom he married to Mrs. Cunningham. He testified before the Surrogate, in regard to the identity of the corpse as that of Dr. Burdell: "I am as confident of it as of my own existence."

The Surrogate says :

"Mr. Marvine stated also that since the decedent's death he has conversed with a number of persons who have described the personal characteristics, appearance, and manners of the deceased, and the description has invariably tallied with his own recollection. This admission of hearsay, and this theorizing, are very much in the way of a clear and unadulterated act of the memory."

Mr. Marvine's opinion was formed as soon as he saw the corpse, and *before* he heard the descriptions of Dr. Burdell by his acquaintances. At the time his opinion was thus formed he drank in hearsay by the wholesale from those around him to the effect that the man he married was not Burdell. According to the doctrine of the Surrogate, the hostile hearsay not having had the desired effect, the favorable hearsay, long after the opinion was form-

ed, is to retroact, and take effect, *nunc pro tunc*, so as to adulterate the original opinion. Any lawyer would suppose that the fact that the description of Burdell by his acquaintances "invariably tallied" with the witness's "own recollection" would, if it had any effect, tend to strengthen and make more reliable the opinion formed before the witness heard any such description; but the mind of the Surrogate being "turned around," he seemed to think that the original opinion was thereby vitiated. Mr. Marvine's testimony of itself was sufficient to prove the marriage.

It was an undisputed fact, established by credible and uncontradicted evidence, that the relations existing between Dr. Burdell and Mrs. Cunningham prior to the quarrel, when he charged her with the theft of the note, indicated that they were engaged to be married. In addition to this, the fact of their engagement was positively proven by Miss Van Ness. With reference to this subject the Surrogate says :

"There is no question that up to some time in the summer of 1856 their harmonious relations had not been disturbed, and that the decedent spoke of the claimant *invariably* in the highest terms. He expressed the belief that she was rich, praised her and her family, her capacity for management.

* * * * *

"Prior to July [1856] *their mutual intercourse was in harmony with a project of marriage.*"

The Surrogate says that :

"The difficulty arising out of the accusation in regard to stealing a note from his safe, Acton says, originated in June or July."

In referring to this the Surrogate says :

"There can be no doubt at all of the existence of a seri-

ous difficulty, and that it occurred in the summer of 1856. Nor is there any reason to suppose the parties were restored to their original relations."

The Surrogate further says that after this

"He [Burdell] was not free in his denunciations to Mrs. Cunningham's friends, but with his own there was no measure to his invective. There is no proof of *vacillation*. During their intimacy he spoke of her with respect; during their warfare, with every token of resentment. There was a strongly marked general current, first in one direction, and then in the other, with little, if any, fluctuation."

In effect, the Surrogate represents that after the quarrel, early in the summer of 1856, Dr. Burdell pursued a generally consistent course of hostility towards Mrs. Cunningham, that he evinced no cordiality or friendship for her, as he formerly had done. The Surrogate's misconception of the evidence while writing this portion of his opinion is amazing. Afterwards, in July, Dr. Burdell and Mrs. Cunningham and one of her daughters went to Saratoga together, and he introduced her to Rev. Mr. Beecher, with whom he had previously arranged in regard to the daughter attending school at his seminary. During their stay, which was for several weeks, according to the evidence of Mr. Beecher, Dr. Burdell visited her at Mr. Beecher's place constantly. Dr. W. B. Roberts and Miss Van Ness testified that he went there two or three times a day and spent his evenings with her. It has already been shown that from the 28th of October, 1856, the date of the marriage, to within a week or two of his death, Dr. Burdell spoke well and ill of her by turns to his and her acquaintances. In the paper signed by him (which was in his own handwriting) at the time the breach-of-promise and slander suits were discontinued, he said :

"I agree as follows:

"1. I to extend to herself and family my friendship through life.

"2. I agree never to do or act in any manner to the disadvantage of Emma A. Cunningham."

And yet the Surrogate says that after the quarrel, early in the summer of 1856, there is no evidence of their friendly relations. It would be supposed from what he says that they did not quarrel and make up by turns. So completely does the Surrogate continue "turned around" as his opinion progresses.

The undisputed evidence showed that after the 28th of October, 1856—the date of the marriage—Dr. Burdell both denied and admitted the genuineness of the marriage. The Surrogate, in effect, holds that his denials are strong evidence against the genuineness of the marriage, and at the same time holds that his admissions are of no value as tending to show that he was married to the claimant. The Surrogate, in his opinion, proceeds upon the assumption that the decedent was not married, and then holds that the admissions should be disregarded because they are inconsistent with the denials.

One of the main reasons offered by the Surrogate to show that the marriage was not genuine is that it was a *secret* marriage. It is strange reasoning to maintain that a *secret* marriage, solemnized in the manner the law directs, cannot be proven unless the evidence shows that it was a *public* marriage. The Surrogate says:

"But secrecy and publicity cannot exist together. If the motive was strong enough to induce an entire seclusion of the matter from his family and intimate friends, it is certainly very extraordinary that he should speak of it to mere acquaintances as if it were a known thing."

Suppose it was "extraordinary" that Dr. Burdell

should so speak of it. Everything done and said by him after Mrs. Cunningham excluded his cousin Dimis Hubbard from her household was "extraordinary." His whole conduct from that time to his death was a series of the rankest inconsistencies. If angered, he would say anything against one behind his or her back, without any regard to truth. Such was the undisputed evidence. He had no "family" to whom he could disclose his marriage. With his near relatives he was on terms of deadly enmity. Had he declared his marriage to his "intimate friends," he would have made himself a laughing-stock, as he had always said he would never marry. But the point is, *he did disclose* the fact of his marriage to the witnesses to whom the Surrogate refers. The witnesses so testified. They were truthful witnesses. The Surrogate in no way questions their integrity. The circumstances were such as to show that they could not be mistaken. The Surrogate proceeds upon the idea that Dr. Burdell was a calm, cool, philosophic gentleman, entirely consistent in his conduct, and would not disclose to mere acquaintances that which he concealed from family and friends. In the evidence, Dr. Burdell nowhere appears as that kind of man; on the contrary, the testimony showed that he was peevish, fretful, irascible, passionate, quick-tempered, reckless in the indulgence of his anger while it lasted—in short, his character was made up of rankest inconsistencies. The fact that the testimony shows such gross inconsistencies in the conduct and declarations of Dr. Burdell is of itself strong intrinsic evidence of its truthfulness.

One of the chief reasons assigned by the Surrogate for not believing that the marriage was genuine was that the parties did not cohabit together. He cites the testimony, especially of the servants, to show that they did not know of Dr. Burdell and the claimant sleeping together after the 28th of October, 1856. Was it

reasonable to expect that the parties to a marriage, to be kept secret until the ensuing summer, would at once not only sleep together, but call the attention of the servants to that fact? The Surrogate's opinion proceeds on the idea that however closely the secret of the marriage was guarded, the fact that they slept together should have been confided to the servants. In cases where there has been no ceremonial marriage, but only what is sometimes called a common-law marriage, the cohabitation afterwards has an important bearing upon the question whether there was in fact an actual marriage. But where there was a ceremonial marriage, subsequent cohabitation has no bearing upon the genuineness and legality of the marriage. The claimant never attempted to prove any other than a ceremonial marriage. So completely "turned around" was the Surrogate that he applied the doctrine applicable to a case where there was no pretence of a ceremonial marriage.

After citing the paper in Dr. Burdell's handwriting, in which he states that he will extend to Mrs. Cunningham and her family his friendship for life, and agrees "never to do or act in any manner to the disadvantage of Emma A. Cunningham," the Surrogate says:

"The settlement, being in writing, must be taken as comprising *all* the terms of the compromise."

If the parties orally agreed to marry in a few days (which they did), what difference did it make whether the agreement was or was not in writing? The Statute of Frauds, requiring certain agreements to be in writing, clearly had no application to the case. The Surrogate says:

"It becomes my duty to pronounce against this allegation of marriage. The reasons leading to this conclusion may be summarily stated thus:

"1. The marriage was clandestine—and there is no presumption in favor of a secret marriage not preceded nor followed by cohabitation."

The doctrine of presumptions had nothing to do with the case. Claimant relied solely upon a ceremonial marriage. In that case, previous or subsequent cohabitation would neither validate nor invalidate the marriage.

"2. The clergyman selected was unknown to the parties.

"3. The place appointed was distant from decedent's residence."

In view of the fact that the clergyman (Mr. Marvine) was selected on the recommendation of the wife of the claimant's old pastor, the second and third reasons are trivial.

"4. The only witness chosen to be present was one of the daughters of the claimant."

The claimant had asked Miss Van Ness to act as a witness, but she refused. Dr. Burdell insisted upon a secret marriage. It was by his request, as well as by the consent of the claimant, that Augusta Cunningham acted as a witness. The secret in the family was kept, except so far as it was necessary to disclose it to the eldest daughter, in order that she might be a witness. Why should the Surrogate invoke the law applicable to the probate of a will requiring more than one witness?

"5. The witness is contradicted by her own statements, made under oath at different times, and by other evidence."

In the material portions of her evidence there were no discrepancies. Although some witnesses contradicted her in regard to surrounding facts and circumstances, yet she was sustained by about double the number of witnesses, whose integrity and fairness the Surrogate does not question.

"6. There is no sufficient identification of the decedent—no act of recognition on the part of the clergyman—but only resemblance indicated."

It has been shown that there was ample "identification of the decedent." The clergyman as soon as he saw the corpse did recognize it as that of Dr. Burdell; and, as the witness Fellows testified, he stated that "he was as positive as he could be it was Dr. Burdell."

"7. The certificate of marriage affords no evidence of identification."

No one claimed that it did. It was not offered as evidence of identification.

"8. The certificate is incorrect as to the name of the decedent, and evinces ignorance or error as to the place of his nativity."

Had any man personated Burdell he would have been very particular to have the name "Burdell" spelled right in the certificate. It was spelled in the certificate "Berdell," instead of "Burdell." Mr. Marvine afterwards in passing 31 Bond Street noticed the way the name was spelled on the door, and then made the alteration in his record, putting the "u" in place of the "e." There is no reason to believe that Dr. Burdell observed this misspelling, nor that the claimant observed it until after his death.

There is no error in the certificate "as to the place of his nativity." It is stated to be "New York." It simply omits to state that he was born in the village of Herkimer. The statement is not as full as it might have been, but it is not erroneous.

"9. There were suspicious circumstances attending the transaction."

The circumstances were those which in the ordinary course of things would attend a secret marriage.

"10. The marriage was not confided by the claimant to any member of her family save one."

It was confided to that one member of the family because she was wanted as a witness. It is a strange reason to urge for disbelieving in the genuineness of the marriage that the claimant kept faith with Dr. Burdell, and did not disclose the marriage to any one, even to her own family, except to one who was a witness to the ceremony.

"11. There was no private or public acknowledgment of cohabitation ; but the alleged parties lived as single persons."

Had the parties acknowledged cohabitation they would have thereby made known the marriage, or confessed that their relation was that of paramour and concubine. Had they not lived as single persons they would have made public the marriage. This is strange reasoning of the Surrogate—that the case was not one of *secret* marriage because the parties neither proclaimed to the world that they were sleeping together, nor did they make the marriage public by openly living as husband and wife. But for the fact that the Surrogate was so completely "turned around" he would not have reasoned thus.

"12. On the part of the claimant there were confidential relations with another person, in respect to whom the decedent charged improper intimacy."

This had no bearing as tending to prove or disprove the fact of the ceremonial marriage. If Dr. Burdell in his lifetime had instituted an action for divorce against the claimant, the truth or falsity of the charge of im-

proper intimacy with another person would have been relevant.

"13. The terms of the settlement of the suits alleged to have led to the marriage are in writing, and exclude the assertion of other terms."

In a previous portion of his opinion the Surrogate refers to the fact that these suits were not *settled*, but *discontinued*. The Surrogate said :

"Thus matters stood when Mr. Frasier appears to have met Mr. Thayer and learned from him that the suits were not 'settled, but discontinued.' This he communicated to the decedent, January 24, 1856, about 4 P. M., who said very little, and went immediately away. * * * Here, then, were those two outstanding claims brought to the decedent's notice—the lease and the causes of action in the suit."

At the time of the discontinuance of the suits no paper was signed by the claimant. The release to Dr. Burdell, prepared for her to sign, was never executed. Had this been a suit in equity to enforce specific performance of a written contract, signed by both parties, to purchase land, the reasoning of the Surrogate might have some relevancy. But to argue that because, under the circumstances, the agreement to marry was not in writing, shows, or tends to show, that they were not afterwards married by the Rev. Mr. Marvine, is arrant nonsense.

"14. The marriage took place after the settlement had been concluded and carried out."

What of it? What difference did it make? The question at issue was: Were the parties in point of fact afterwards—namely, on the 28th of October—married? If "the marriage took place" at all, it was of no

consequence whether it was *before* or after the discontinuance of the suits.

"15. The claimant executed written instruments to the decedent in her own name after the marriage. She assigned a judgment; he drew a check to her order; she endorsed it; and he swore to an affidavit; in all which she was described by her own name."

In other words, Dr. Burdell and the claimant kept the marriage a secret, as they had agreed to do. Had the claimant, in a business transaction, disclosed the fact that her name was "Emma A. Burdell," she would have made the marriage public.

"16. At the settlement of the suits, she stipulated for a new lease of the house."

After the villanous manner in which she had been treated by Dr. Burdell, it would have been prudent for her to have a new lease of the house, and keep the power in her own hands, so that if he failed to fulfil his promise to marry she could not only remain in the house, but could renew her suits against him for breach of promise and slander.

"17. Shortly before the decedent's death she released all causes of action and abandoned her agreement for a lease."

Counsel on the part of claimant maintained that this release was a palpable forgery. But even if it were executed by the claimant, that fact would not militate against the theory of a secret marriage. As the arrangement was that the decedent, the claimant, and her daughter Augusta should go to Europe the next summer, they might have thought it best to let the portion of the house which he would not require for dental purposes after their return.

"18. He spoke of her with contumely and reproach, and made repeated declarations against marriage."

There is nothing in this which even tends to overthrow the proof of the secret marriage, especially as he at the same time, to various persons, spoke well of her and admitted the marriage.

"19. He was determined to compel her to leave the premises, and a new lease to another party was about to be executed."

There was evidence that he said to other persons that he desired she should leave the premises; but there was no evidence that he expressed to her any such desire, or intimated to her the slightest wish that she should leave. The testimony showed that he was a "two-faced" man; and it is quite probable that he was so in this particular.

"20. The marriage was first announced after his death."

As the period during which the parties agreed to keep the marriage secret had not expired at the time of his death, it could not have been announced before that event, unless one or both of the parties had violated their agreement.

Whatever may be said of the defects and incongruities appearing in different parts of the Surrogate's opinion, as a whole, in all candor, it must be conceded that it is a masterpiece of judicial—*absurdity*.

For over eight months—namely, from the 31st of January, 1857, when the office boy discovered, lying on the floor of his office, the dead body of her murdered husband, until the 10th of October, when she was admitted to bail upon a criminal charge having no more legal foundation than

"The baseless fabric of a vision"—

Emma Augusta Cunningham-Burdell had occupied more of public attention than any other living person in the known world. Her first introduction to the public was associated with scenes of horror, accompanied with charges against her of fiendish crime. Then followed brutal and savage treatment of herself and her innocent family. Overwhelmed with an avalanche of public odium, from which in a few weeks she emerged to become an object of sincere commiseration on the part of the public; soon carried on the topmost wave of public sympathy to a triumphant acquittal upon the charge of having been the assassin of her husband, she became in public estimation a heroine who had passed unscathed through persecutions such as but few women could pass through and live. When the civilized world enjoyed her success and desired that she should be victorious in her contest to establish the genuineness of her marriage to Dr. Harvey Burdell; when the evidence was all in, and the unanswerable argument in her favor had been delivered, and the opposing argument, ineffectual in its assaults upon her legal rights, was ended; when her triumph was regarded by her Counsel as sure;—suddenly she sprang to the aid of her enemies and led their forlorn hope to victory. By pretending to be the mother of a child, born a few hours before in a hospital, which was borrowed for the occasion, she sank herself so deep in moral degradation that it was beyond the power of her Counsel and friends to resurrect her—had they been so disposed.

Thus ended one of the most extraordinary cases that ever appeared in the annals of jurisprudence. The public career of Mrs. Cunningham-Burdell began with the most startling and thrilling tragedy; it ended in thoroughly disgusting low comedy.

CHAPTER XIX

SKETCHES OF JOSHUA A. SPENCER, MARTIN GROVER, AND
JOHN K. HACKETT

Joshua A. Spencer

JOSHUA A. SPENCER was one of the great lawyers of the State of New York. He was born about the year 1785. Early in his practice he settled in the city of Utica, Oneida County. He was strong in the argument of cases on appeal in the Supreme Court and Court of Errors—the Court of last resort; but his great *forte* was in jury trials. He was of commanding figure, had a sonorous, well-modulated voice, and was a powerful and logical speaker. Upon trials, he brought out the evidence on his side with great clearness, and in a frank and candid manner, which was very effective with a jury. He cross-examined his adversaries' witnesses with signal skill and discretion. Upon the close of the evidence his addresses to juries were powerful and eloquent. Everything he said was clear and direct, and uttered with a frankness that was absolutely charming. His influence with juries seemed to be irresistible. In middle and western New York, where he was the acknowledged leader of the Bar, he was without a rival in his successes in obtaining verdicts. His practice was large and lucrative, and extended all over the State. In important cases in the City of New York he was not unfrequently retained. During the administrations of General William Henry Harrison and John Tyler he was United States District Attorney for the Northern

District of New York. One case of intense interest and great national importance with which he was prominently identified was that of Alexander McLeod. The case is reported in 25 Wendell's Reports, page 483. A part of the syllabus is as follows :

"During the possession of Navy Island, in the Niagara River, in the winter of 1837, by *British insurgents* (aided by misguided individuals of this country), an expedition was fitted out under the direction of the *Colonial authorities of Canada* for the destruction of a *steamboat* which was suspected to have been used in conveying warlike stores to the island. The boat was captured while moored on the American shore of the river and burned, and during the *mêlée* an American citizen was killed.

"*It was held* : That a British subject, who was charged to have belonged to the expedition and was subsequently arrested, was liable to be proceeded against *individually in the criminal Courts of the State of New York*, and held to trial on an indictment for *arson* in the destruction of the boat and for the murder of the deceased, notwithstanding that the act of the Colonial authorities had been subsequently avowed by Great Britain, and that *negotiations were pending between the governments of the United States and Great Britain* on the subject of the invasion of our territory and its consequences."

Alexander McLeod was indicted at the Niagara County General Sessions in 1841, charged with the murder of Amos Durfee on the 30th of December, 1837. The indictment having been removed into the Supreme Court, a writ of *habeas corpus* was issued, upon which he was brought into that Court, and a motion was made that he be discharged by the entry of a *nolle prosequi*, or upon his own recognizance, or that the Court direct an absolute discharge. In support of this motion an affidavit of Durfee was read by his Counsel, in which it was averred :

That in December, 1837, about two or three hundred men from the State of New York took forcible and hostile possession of Navy Island, in the Niagara River, lying within the Province of Upper Canada.

That the occupants of Navy Island were largely composed of citizens of the United States, and were commanded by Rensselaer Van Rensselaer, one of such citizens.

That these invaders were supported with provisions and arms exclusively from the United States and by citizens thereof.

That the object of the invasion as then proclaimed was to cause the said Province to be separated from the Government of Great Britain and to erect it into a new and independent nation by force.

That in order to repel such invasion, an army of about twenty-five hundred strong was assembled at Chippequa by the authorities and under the direction of the Provincial Government.

• That on the 30th of December, 1837, the steamboat *Caroline* proceeded from Black Rock, or Buffalo, landed a quantity of military stores on Navy Island, and commenced plying between the said island and Schlosser, in the State of New York, transporting to the said island men and provisions and implements of war for the support and comfort of those who were then engaged in hostility against the Government of Great Britain.

That on the evening of the next day an expedition of seven small boats with sixty-three armed men was fitted out at Chippequa under the direction of Allen McNabb, lawfully in command of her Majesty's forces and invested with full authority to do so, and commanded to take the said steamboat *Caroline* by force wherever found, and bring her in or destroy her.

That the persons who composed said expedition found the said steamboat *Caroline* fastened to the dock at

Schlosser, and there, by the use of swords and fire-arms, expelled those who occupied her, and destroyed her; and that one Amos Durfee, a man employed on the said steamboat, was killed by being shot through the head with a pistol or musket ball by some one of the persons engaged in that expedition and while engaged in accomplishing the object thereof.

That the destroying of the said steamboat *Caroline*, and the conduct of the persons engaged in such destruction, including the killing of said Durfee, had since been approved and adopted by the Government of Great Britain as a necessary act of self-defence on the part of the authorities of Upper Canada.

That the Government of the United States, immediately after the destruction of the said steamboat *Caroline*, demanded reparation of the Government of Great Britain.

It was further averred that McLeod was not one of the persons engaged in the expedition against the *Caroline*, and that he had nothing to do with the killing of said Durfee.

The argument before the Supreme Court was opened by Alvin C. Bradley for McLeod. After Jonathan L. Wood, District Attorney of Niagara County, and Willis Hall, Attorney-General of the State of New York, had been heard, Mr. Spencer made the closing argument on behalf of McLeod. The report of the argument begins at page 542 (25 Wendell) and ends on page 565. Mr. Spencer concluded as follows:

"If war must come, let it come. As Americans we will meet it, but let us not forget that "Thrice is he arm'd that hath his quarrel just." Great Britain has avowed this open, flagrant violation of our territory, with all that was done. Let us take her at her word and hold her to her responsibility. When she has denied our right, and refused to make suitable and honorable reparation, when moderation and forbear-

ance cease to be virtues, then will the President of the United States inform the council of the nation of the true state of the question, of which we know so little, and then shall its collected wisdom choose its own time and mode of redress.

"The trial of McLeod savors of cowardice and revenge, and is unworthy of our country ; but the trial of the British nation we, as Americans, understand, and, when necessary, as Americans will attend. In that trial there will be no British party on this side of the waters.

"But let this most troublesome and embarrassing difficulty be removed, in the only way in which it can be done in law and honor, and leave the United States Government in the free exercise of its constitutional powers, and there is every reason to believe that all the great questions which now agitate the two nations will be speedily, justly, and honorably settled, their peace be preserved, and the prosperity and happiness of our country be perpetuated to after generations. Let the National and State governments continue to move only in their respective spheres, regarding alike the rights of each other and the law of nations ; let them cherish their own honor and dignity, by regarding the honor and dignity of other nations, and not only the Attorney-General, but all of us, will be satisfied with the respect accorded to the exclamation, 'I am an American citizen.'"

Mr. Spencer was subjected to some severe criticism for acting as Counsel for a person indicted in the State Court for murder when he (Mr. Spencer) was United States District Attorney for a district which embraced the county in which the prisoner was indicted and the county in which he was afterwards tried. Mr. Spencer, at the commencement of his argument, page 542, in vindication of his conduct in this regard, said :

"After adverting to remarks which had been made out of Court, in reference to his appearing on this motion as the Counsel of the accused, he holding the office of District At-

torney of the United States for the Northern District of New York, he observed that at an early stage of the proceedings, and before his appointment to that office, he had been retained as Counsel for the accused ; and that he would say to all who thought that his appointment should induce him to relinquish the defence of his client, that they very erroneously appreciated the duties of his office, the merits of the question involved in the defence of the accused, and his own views of responsibility. A Counsellor of this Court could not refuse to discharge the duties he owed to his client because other duties entirely compatible with the first had devolved upon him, and he trusted that he should discharge both to the best of his ability. He also reprobated the attempt which had been made by some of the partisan prints of the two great political parties of the country to create political capital out of the question whether his client should be held to trial upon the indictment found against him. Its tendency, he said, was to prevent an impartial trial, if a trial must be had ; to strengthen and deepen the prejudices which already unhappily existed on both sides of the border ; to embarrass the negotiations pending between our own and the British Government, and to expose them to an open rupture."

Judge Cowen, in delivering the opinion of the Court, held that, assuming the facts stated in the affidavit of McLeod to be true, he was liable to be proceeded against individually in the criminal courts of the State of New York, and held to trial for arson in the destruction of the steamboat *Caroline*, and for the murder of Durfee. Judge Cowen also held that upon a writ of *habeas corpus* the Court or officer before whom the proceedings were had could not, upon the subject of the guilt or innocence of the accused, look behind the indictment; and, therefore, if the facts stated in the affidavit were true and undisputed, and constituted a complete defence to the charge made, the prisoner should remain in jail

without bail until a trial could be had before a Court and jury.

The opinion of Judge Cowen was in such direct conflict with well-settled, fundamental principles of law that it was a shock to the Judiciary and the Bar. The Governments of Great Britain and the United States having taken the position that if McLeod took part in the expedition to destroy the *Caroline*, and, while so engaged, killed Durfee, the British Government was responsible for what he did, and that he incurred no individual liability for his acts, and was not amenable to the criminal courts of the State of New York, it was strange that Judge Cowen should deny his right to be discharged. Instead of appealing from the decision, McLeod's Counsel thought it expedient to go to trial. The case having been removed from Niagara County to the county of Oneida, he was tried in October, 1841. An *alibi* was proven to the satisfaction of the jury, and he was acquitted. Mr. Spencer was leading Counsel, and conducted the defence with masterly ability.

The acquittal of McLeod having rendered an appeal from the decision of Judge Cowen unnecessary, in order to deprive the decision of all respect and destroy its authority as a precedent for future cases, Judge Daniel B. Talmadge, of the Superior Court of the City of New York, wrote and caused to be published a masterly review of it, in which he very clearly showed the fallacies of Judge Cowen's reasons and the unsoundness of his conclusions. The views of Judge Talmadge, expressed in his review, were acquiesced in and cordially approved in letters to him by some of the most distinguished jurists in the land, including Chancellor Kent and Chief-Justice Spencer, of New York; Chief-Justice Gibbons and Judge Rogers, of the Supreme Court of Pennsylvania; Simon Greenleaf, Professor of Law in Harvard University; from Daniel Webster, and from the following United

States Senators: John M. Berrien, formerly Judge of the highest Court of law and equity in the State of Georgia; J. M. Huntington, formerly Judge of the Supreme Court for the Correction of Errors in the State of Connecticut; Thomas Clayton, formerly Chief-Justice of the State of Delaware; John J. Crittenden, of Kentucky, formerly Attorney-General of the United States, and Rufus Choate, of Massachusetts. The review of Judge Talmadge and the letters of the distinguished jurists above referred to are published as an appendix in the 26th of Wendell's Reports, page 663.

Many graduated from Mr. Spencer's office who afterwards became distinguished as lawyers and statesmen. Francis Kernan, a distinguished member of the Bar, who was a member of Congress and afterwards served one term in the United States Senate, studied law in Mr. Spencer's office, and subsequently became his law partner. Roscoe Conkling was a legal pupil of Mr. Spencer, and was admitted to the Bar from his office.

Mr. Clinton early in his practice became personally acquainted with Mr. Spencer by reason of his having been retained as one of the Counsel for a near relative of his (Mr. Spencer's) in a case of great importance. Mr. Clinton afterwards experienced not a few instances of the kindness and genial friendship of Mr. Spencer. It was his nature to be very kind to young lawyers with whom he was brought in contact. In consultation he was remarkably prudent in mapping out plans for the conduct of trials. When his associates were, as he thought, rather too sanguine as to what the decisions of the Court would be in respect to the admission of evidence, and would urge that the law was so clear that the Court could not decide otherwise than in their favor, he would relate the following anecdote:

His first professional experience was in defending a man charged with the criminal offence of assault and

battery, before a justice of the peace. The point for the justice to decide was whether there was sufficient evidence to justify him in holding the defendant for trial. After the testimony was all in, there being, as Mr. Spencer thought, not sufficient evidence to incriminate his client, he argued the case very thoroughly. Having demonstrated that his client was entitled to be discharged, he closed his argument, into which he had thrown all the feeling and pathos of which he was capable, by saying: "On such testimony your Honor can't hold my client." Said the justice: "Can't, eh? I held three men yesterday on no evidence at all! *Never say can't to me, young man!*"

Martin Grover

One of the most unique characters that ever practised law or sat upon the Bench in the State of New York was Martin Grover. He resided in Alleghany County. In 1857 he was elected to the Bench of the Supreme Court in the Eighth Judicial District, in which he had been engaged in the active practice of his profession almost from the time of his admission to the Bar. At the expiration of his first term he was re-elected. In 1867 he was elected a Judge of the Court of Appeals, and served until that Court was broken up. In 1870 he was elected to the new Court of Appeals, and remained a member of that Court until his death, in 1875, at the age of about sixty years. He possessed ability of the highest order. His grasp of law and its application to the facts of any given case seemed marvellous. As a lawyer, he was shrewd, keen, far-sighted; and upon trials he managed to concentrate attention on the turning-points, so that if he had any sort of a case success was almost inevitable. In that portion of the State where he lived and practised his influence was supreme. His powerful logic, keen wit, and overflowing—and

frequently grotesque—humor never failed him. Sometimes by a single question, on cross-examination, or by the utterance of a single sentence, he would give such a turn to a case that victory on his part was certain.

If testimony were given bearing strongly against his client, he had a remarkable faculty of destroying its effect by making it appear supremely ridiculous. Before he went on the Bench he defended a man indicted for the murder of his wife by throwing her down a well. In addition to proof of the circumstances of the homicide, the prosecution, in order to show not only his want of affection but his cold-blooded and brutal indifference to his wife, called as a witness a clergyman, who testified that he attended her funeral and sat in the pulpit with the officiating clergyman; and that while the latter was engaged in prayer the prisoner was looking across the church and winking at some of the girls on one side of the room, and continued to do so during the prayer. The impression given by this testimony can well be imagined. Its effect was to shock the jury and the audience. In construing the conduct of the prisoner in respect to the circumstances of the homicide, it was not unlikely that this evidence would be the turning-point to convict him. Grover's cross-examination of the witness was very brief. It was as follows:

Question. "You say, while the minister was praying you saw the prisoner looking and winking at some girls. How did you happen to see him?"

Answer. "I was holding my hands over my eyes and I saw him through my fingers."

Q. "Did you watch him all the while the minister was praying?"

A. "Yes, and I was surprised at his conduct, and watched him all the while the minister was praying."

Said Grover: "That was right; that was according

to Scripture—'Watch and pray'; *while Brother Jones prayed, you watched!* That is all."

All in the court-room were convulsed with laughter, and the clergyman left the stand in great rage. As he passed the table where Counsel sat he hissed out at Grover, so as to be heard all over the court-room: "You are a gentleman!" Said Grover: "Hold on; go right back on the witness stand. I've long wanted a witness I could prove that fact by. But I give you fair notice if you swear I am a *gentleman* there are a thousand men in Alleghany County, where I live, that will impeach you." The discomfited witness went to his seat amid the general laughter of all present. Grover won his case. His client was not convicted.

In the tribute to his memory by the Judges of the Court of Appeals (see 59 N. Y. Rep., 663) his characteristics as a trial Judge are set forth as follows:

"He was patient when patience was needed. He was of speedy discernment of the facts of the case and of the material issues involved. He was stored with fundamental legal principles, which his ready judgment, in its quick and accurate application, made a fertile material. He was sagacious, self-reliant, cool, and collected—a shrewd observer of men and things, knowing the springs of human action and all its currents and eddies. He was clear in his conceptions and happily intelligible in the expression of them. Confident in his knowledge and judgment, he was prompt and explicit in ruling, meeting quickly and quickly disposing of questions as they arose; and thus he was a Judge who did try the cause before him, directing the course of it, and did not helplessly drift with it. He was independent and fearless, and loved justice, being honest of heart and pure in life and purpose. As his characteristics were known, his reputation was high, and public confidence and respect, and the trust of the Bar, followed and waited upon him."

His merits as a Judge of the Court of Appeals are described as follows :

“He brought to this Court the qualities which he had shown at Circuit and made useful at General Term, strengthened by his broad experience there ; and his learning in fundamental principles, his readiness of apprehension, his firmness in conviction, his vigorous common-sense, cutting to the core of the question, his untiring industry, which digested every case, and his independent discharge of duty, unawed by fear or clamor, made him an influential and valuable member of this Court, whose loss from it will long be felt by those who remain.”

On the Bench it was difficult for him to avoid the exhibition of peculiarities which were so conspicuous when he was at the Bar. At Circuit, while calling the calendar or presiding at trials, his terse, quaint, and humorous observations, called out by something said by Counsel or witnesses, resulted in frequent roars of laughter from all present. To preserve order at times was a difficult and almost impossible task. He was so full of genuine humor it could not but overflow on the slightest occasion. In the language of the tribute, above referred to, of the Judges of the Court of Appeals, “His humor was so lively and mastering that it sometimes jostled dignity and even decorum.” In speaking of other traits, this tribute of his fellow-judges correctly states :

“He was very real and practical, and hence not pleased with forms nor observant of conventionalities, or, at times, of courtesies. He was so quick to perceive and correct to judge that it fretted him to slack his pace for a plodder, and he was sometimes abrupt.”

He did not seem to have the capacity to sit quietly, look grave, and silently listen to the arguments of Counsel. To illustrate this peculiarity, John Ganson, a distinguished lawyer of Buffaló, perpetrated a practi-

cal joke on Judge Grover which but few lawyers would have dared attempt. Ganson had a case on argument in the Court of Appeals. His opponent argued his side of the case first. Judge Grover continually interrupted with suggestions in the nature of arguments on the other side. In so doing, Judge Grover presented the views which Ganson had intended to set forth in his argument. When Ganson's opponent closed his argument, he (Ganson) did not rise to reply. Judge Grover said to him: "Proceed, sir, with your argument." Ganson replied: "I have no right to argue my side, as the rule of the Court permitting only one Counsel on a side to be heard is still in force." Judge Grover blushed, and Mr. Ganson proceeded with his argument.

John K. Hackett

John K. Hackett, for many years Recorder of the City of New York, possessed decided ability and strongly marked individuality of character. He was a son of James Hackett, the great actor, whose inimitable and perfect personation of the character of Falstaff never has been, and probably never will be, equalled by any one on the American or English stage. John K. Hackett was admitted to the Bar about fifty years ago. After practising in New York City several years, he went to California with other New-Yorkers about the time the gold fever broke out. He practised law in the city of San Francisco a few years, and then returned to New York City. While in California, one peculiar accomplishment of his was not without its advantages. He was reputed to be, and probably was, the best pistol-shot in the United States. His skill in this regard continued through his whole life. Many illustrations of his marvellous dexterity could be cited. He would get a friend to stand, say, twenty or thirty feet from him, hold up one arm with a twenty-five-cent piece between his thumb and forefinger, and

Hackett, with his pistol, would shoot at the piece of silver and hit it every time. It is said that on one occasion, when dining as the guest of the family of a distinguished Judge of the Supreme Court with whom he was on terms of closest intimacy, having partaken freely of champagne, the dinner being nearly through, Hackett said to a lady sitting opposite him at the table: "Please hold your head still for a moment while I view the little ribbon hanging from your hair." He then fired his pistol, and the ball hit the ribbon, severing it from her head just below the ear.

While in California Hackett and George G. Barnard were intimate friends. Barnard, soon after he commenced his residence in the City of New York, was elected Recorder, and before his term had expired was elected Judge of the Supreme Court. Through Barnard's influence and the friendship of Hon. A. Oakley Hall, Hackett became Recorder. His judicial career was held in high esteem by the Press and the community generally. He had the reputation of being a bold and fearless Judge, and his name was a terror to criminals. In his charges to juries he was outspoken in the expression of his views of the facts. It was not at all difficult for a jury to understand what verdict he thought they should render. Not a few instances might be given of the peculiar effect of his charges to juries. In one instance the effect was quite ludicrous. He charged the jury in very decided terms. No mistake could be made by any of them as to what verdict he thought they should render. Some of them were quite fresh in jury service. Believing it to be their duty to obey the Court, and knowing what verdict the Recorder desired, when the jury were told to retire, under charge of an officer, and, when they had agreed upon their verdict, return into Court, three of the jurors sidled up to the Recorder, and one of them, acting as spokesman, said: "Your Honor, I suppose there is no use of us three going out, as *we* have agreed on our verdict."

CHAPTER XX

CASE OF DR. E. M. BROWN

An Extraordinary Case.—Full of Thrilling and Tragic Incidents.

CLEMENTINA ANDERSON, a young girl twenty years of age, the daughter of James Anderson, whose business was that of sexton and undertaker, left her father's house, in the city of New York, on the 25th of October, 1862. He and his brother were greatly alarmed on account of her absence. Augustus L. Simms, a young man, then about twenty-six years of age, who carried on the business of sign-painter, had visited her as a suitor for two years. Miss Anderson's father and uncle continually inquired of Simms if he knew where she was, and urged him, if in his power, to aid them in finding her. He denied that he had any knowledge on the subject, but suggested that she had probably gone in the country to make a visit, and would return soon. Her father, as best he could, bore up under his heavy affliction, and persevered in his search for his daughter with unflagging zeal. Heart-broken with his ill-success, after the lapse of a little over three weeks, while sitting in his desolate home, the bell rang, the door was opened, and his daughter was borne into the room in the arms of two strangers and laid upon the sofa. Overjoyed to behold her again alive, he went into an adjoining room, and immediately returned. Although he had been absent less than five minutes, she was *dead!* Investigation set on foot revealed the fact that she had been during the whole or part of her absence

in a certain house in Eighth Avenue, where Dr. E. M. Brown had his office. A Coroner's inquest was had, the result of which was the jury found that Miss Anderson's death was caused by Dr. Brown. After the verdict was rendered, and the Coroner had held Dr. Brown as a principal, he took the evidence of Simms, attached it to the record, and held him to bail as a witness.

Mr. Clinton was retained as Counsel for Dr. Brown. He at once (on the 5th of December) applied to Judge McCunn, City Judge, for writs of *habeas corpus* and *certiorari*, which were granted; and an examination was had, commencing on the 11th of December and ending on the 13th of that month. The probability was that on the trial of Dr. Brown, Simms would be the principal witness for the prosecution. It was thought that as a matter of course Simms, in order to escape indictment and conviction himself, would swear guilt upon the doctor. Mr. Clinton was determined to discredit Simms in advance, and show that the vileness and atrocity of his conduct were such that no jury would believe him. In this Mr. Clinton succeeded fully. He elicited, on cross-examination, admissions from Simms that for two years or more he had visited Miss Anderson as a suitor, and that the family received him as such; that when he commenced his visits he intended to marry her; that afterwards he changed his mind, although he concealed from her that his intentions had undergone any change, and continued his visits the same as formerly; that months afterwards he commenced taking liberties with her, and that finally, when she had every reason to believe he intended marriage, accomplished her ruin. After she left her home, her father and her uncle implored Simms, if he had any knowledge of her whereabouts, to relieve them of their heart-rending anxiety. He admitted that he had lied to them, and professed entire ignorance; when, in truth, she left by his advice, and was

acting under his direction, he being the guilty cause of all her troubles and calamities. The result of the examination was that Simms was held as a party and committed to prison to await the action of the Grand Jury. At the close of the examination Judge McCunn addressed Simms as follows :

“Since this examination commenced before me I have read at intervals the testimony in this case very carefully, and it pained me very much to see a young man of your appearance in such a position; still, I feel it to be an imperative duty to commit you to prison. I have had many cases before me, but I never saw so much cold-bloodedness in any case, and it compels me to pursue the severest course I can against you. I intend to commit you in chief as one of the parties. In doing this, on my own motion, I am satisfied that it is a case that should go before the Grand Jury.”

One of the New York papers, in commenting upon the proceedings before Judge McCunn, said :

“This fellow [Simms] has not run away, as it was reported he had, but has appeared before Judge McCunn to undergo a cross-examination at the hands of Henry L. Clinton, Esq., Counsel for Brown, a report of which will be found in another column. If anything could add to his previous infamy, the testimony given by him on this examination finishes the work, and stamps him as an unmitigated scoundrel of the blackest hue. He admits that he waited on this young lady in the first instance as a suitor, and that he intended to marry her; that afterwards he changed his mind, but that he had never communicated that fact to her; that just previous to seducing her he altered his mind and thought he would not marry her, and then set about to accomplish the ruin of the girl that he had previously intended to make his wife.”

Subsequently Dr. Brown was indicted for manslaughter in the fourth degree for having caused the death of Miss Anderson. The case was brought on for trial in the

Oyer and Terminer of the City and County of New York (Judge George G. Barnard presiding) on the 12th of March, 1863. The impanelling of the jury was commenced. On the 16th of March only six jurors having been impanelled, the Court, notwithstanding the strenuous opposition of Mr. Clinton, discharged the six jurors so impanelled and adjourned the case indefinitely.

Sydney H. Stuart was associated with Mr. Clinton for the defence. He was a remarkable man and had a most remarkable career. He had not the advantages of an early education. What education he had was acquired late in life. He first came before the public in connection with so-called "Know-Nothing," or Native American, politics. When that party carried the city of New York and elected James Harper Mayor, Stuart was appointed Police Court Clerk. Afterwards he was elected a Police Justice. Subsequently he was elected City Judge, but resigned before the expiration of his term. Then, being about fifty years of age, for the first time he commenced the practice of law. His appearance was not in his favor. He was of large frame, very tall, very stout, and very round-shouldered. His voice was loud and not pleasant. In early life he had been an auctioneer; and some thought the loudness of voice and rapidity of utterance thus acquired continued with him through life. He was a man of large intellect; yet, from lack of the mental discipline which comes of early education, his oral arguments, like his person, were apt to be unwieldy. Practically, it was not always easy for him to draw the line with prudence as to what should be said and what should be left unsaid. Occasionally his oral arguments appeared very much like one thinking aloud. At times, had he been actually soliloquizing he could hardly have been more frank. On one occasion, when arguing a case before Chief-Justice Oakley, of the New York Superior Court—his voice was very

loud—he spoke almost in tones of thunder. Finally the Chief-Justice, his patience nearly exhausted, interrupted him and said: “Mr. Stuart, please not to speak so loud; the Court is not deaf.” Stuart replied: “Yes, your Honor, but—but—my client *is*.” Stuart incautiously let out the fact that the most he cared for was that his client should hear and appreciate his argument. The Court was altogether a secondary consideration. His lack of mental discipline, and apparent inability to practise reticence when the interests of his client imperatively required it, sometimes led to singular consequences.

Mr. Clinton regarded the indictment against Dr. Brown as bad, and thought that if, contrary to expectation, he should be convicted, the conviction would be set aside, either on a motion in arrest of judgment or upon an appeal to the Supreme Court. Ex-Judge Stuart was of the same opinion. Mr. Clinton relied upon his associate to keep this point to himself and not disclose it to any one—in other words, “not to give it away.” Ex-Judge Stuart was well versed in criminal law, and very tenacious of his opinions. After the case was adjourned, as above stated, Stuart engaged in a discussion with Henry Vandervoort, Clerk of the Court, in regard to the case of Dr. Brown. Mr. Vandervoort evidently thought that if the trial had gone on the doctor would have been convicted and sentenced to prison. Stuart combated this proposition, and, finally, in order to triumph in his discussion with Mr. Vandervoort, stated to him the point which would have vitiated the indictment. Stuart had no idea that the prosecution would be informed that the indictment was defective. He supposed, as a matter of course, that Mr. Vandervoort would keep the matter to himself. The result was, however, the District Attorney abandoned the indictment and procured a new one against Dr. Brown for murder

in the first degree. Mr. Clinton was amazed that the prosecution should take such a course, it being altogether unprecedented, there never having been an instance in the city of New York where any one charged with perpetrating an abortion had been indicted for murder, or for any higher offence than manslaughter in one of the different degrees. After the new indictment had been found, and the trial was about to be brought on, ex-Judge Stuart told Mr. Clinton for the first time of the conversation and argument he had had with Mr. Vandervoort. Then it was clear why the prosecution had so suddenly changed front. This indiscretion on the part of ex-Judge Stuart, Mr. Clinton believes, was quite disastrous in its effect upon their client.

On the 8th of April, 1863, Dr. Brown was arraigned in the General Sessions of the City and County of New York (John T. Hoffman, Recorder, presiding) upon the new indictment. Mr. Clinton filed a special plea in Bar, setting up that the defendant had been once in jeopardy by reason of the six jurors having been impanelled in his case and discharged despite the opposition of his Counsel, as above stated. To this plea the District Attorney demurred. The demurrer came on for argument on the 13th of June following. On the 22d of June, Recorder Hoffman rendered a decision sustaining the demurrer, and delivered the following opinion :

“The plea in this case shows that in the Court of Oyer and Terminer the prisoner was arraigned, and the Sheriff having returned a panel of petit jurors, six of the persons so returned were sworn according to law to try the indictment against the prisoner, and (in the language of the plea) ‘that thereupon, without proceeding to impanel, and have sworn six other jurors, so as to make a *full jury*, the said Court, etc., without the consent of the said defendant, discharged said six jurors altogether,’ etc. And the plea then proceeds to aver that said discharge of said six jurors was without

any 'legal necessity' and without any special cause, and that the defendant objected thereto and excepted to the decision of the Court. To this plea the District Attorney demurs, and this raises the simple question, whether, after six jurors are sworn, the Court may, without proceeding to 'swear others, so as to make a *full jury*,' and without any 'legal necessity' or 'special cause,' in the mere exercise of its discretion, suspend all further proceedings and discharge the six jurors who have been sworn.

"The prisoner's Counsel claims, on the one hand, that 'his client has been once in jeopardy,' and cannot therefore be again brought to trial. On the other hand, the District Attorney insists that a prisoner is never in 'jeopardy' until a 'legal jury' has been sworn and charged.

"No case is cited by prisoner's Counsel in support of his opinion, and it must be admitted that none can be found in the books. Indeed, it was conceded on the argument that the precise question is now raised for the first time. Such being the case, it would be perhaps sufficient for me to sustain the demurrer, without alleging any reasons therefor, and leave it to the Appellate Court, after more elaborate argument than has been submitted, to reverse my decision if it is wrong. But I am constrained to make some suggestions which seem to me pertinent to the question.

"It may be, for all present purposes, conceded the test of whether a prisoner had been 'once in jeopardy' is not to be tried, as has been sometimes claimed, by the plea of *autrefois acquit* or *autrefois convict*, and that *jeopardy*, in its legal and constitutional sense, may have existed even when there has been no verdict of acquittal or conviction.

"There are cases which determine that a plea of 'once in jeopardy' may be upheld where a jury, having been sworn and charged, have, without the consent of the defendant, before verdict, been discharged by the Court, without any legal necessity or special cause therefor. (*Commonwealth v. Cook*, 6 Searg. & Rawle, Penn. Rep., 7; *Commonwealth v. McFadden*, 11 Harris's Rep., 12; *Commonwealth v. Fields*, 6 Leigh's Virginia Rep., 613; and also in cases in

North Carolina, Tennessee, Alabama, and Indiana, cited in Wharton's Criminal Law, sections 517, etc. And see also *People v. Barrett & Ward*, 2 Caine's Rep., 304; Selden's Opinion, *Guenther's Case*, 24 N. Y., 102.)

"In all these cases the Courts proceed upon the assumption *that to be any trial* within the meaning of the Constitution was to be in jeopardy. On the other hand, the United States Courts in several cases have held that no person has been in jeopardy unless a verdict has been rendered, and that the Courts have a right, in the exercise of a sound discretion, to discharge a jury before verdict. (Wharton's Criminal Law, 580 and 581.)

"But no Court has ever determined that jeopardy begins until a jury is sworn and charged. When a jury has been sworn and charged it has been considered that a 'jeopardy' existed, simply because such jury had the power to convict. The prisoner then, and not till then, was in danger. And this is manifestly the only reason for the rule. No number of jurors less than twelve can constitute a legal jury. (*Cancemi's Case*, 18 N. Y. Rep., 135.) The plea in the case now under consideration admits that no full jury was sworn. Six jurors only were sworn. They had no power to acquit or convict. True, they were sworn, and were *individually* charged with the case, as they were sworn; but as a *legal body* they did not have, and could not have, the prisoner in charge until, six more being sworn, they together became a legal jury, having power to acquit or convict the prisoner. The trial was not, in any legal sense, commenced. The issue to be tried is the one of fact, 'Guilty or Not Guilty,' and how can a trial of an issue of fact be said to have commenced until a jury competent to try it is sworn and charged? The swearing of one or six jurors is but a part of the preparation for a trial, just as the arraignment of a prisoner, and calling upon him to plead, and asking him if he is ready for trial, and placing him in the box, and making the usual proclamation by the crier, are each steps in the preparation for a trial. It will not be claimed, I think, that if any one of these things, or all of them, are proceeded with,

and the proceedings be then suspended by the Court, a person could plead 'once in jeopardy.'

"A trial is the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue (Bouvier's Law Dictionary). A jury of twelve men, as we have seen, is the only proper tribunal for trial of the issue of guilty or not guilty, and until such tribunal is constituted there has been, and can be, no trial; and, according to all the authorities, where there has been no trial there has been no jeopardy. This, in my judgment, is the whole argument, and disposes of this case. It states itself, and is not susceptible of elaboration. It is the swearing and charging of a *jury*, not the swearing and charging of one or more *jurors* less in number than *twelve*, that inaugurates a trial. It is when the *jury* is sworn and charged that jeopardy begins. When a legal jury is sworn, it is *charged* with the case, and not until then. Whether, as jurors are called and selected, they are or are not sworn, does not alter the case. Whether sworn or not, they are merely individuals, until, by the completion of the full legal jury, they become the legally constituted body empowered to determine the issues in the case.

"Such being my views, I must hold that the defendant has not been once in jeopardy. The Oyer and Terminer had the right, in its discretion, to suspend proceedings, with or without legal necessity or special cause, at any time before the *jury* was sworn and charged. Judgment must, therefore, be declared for the people on the demurrer."

Nothing remained but to go to trial on the indictment for murder. The disadvantages of a trial under that indictment were great. As the District Attorney would ask for a conviction of a capital offence, and the defendant's Counsel would strive for an acquittal, there would be great danger that the jury would compromise on a verdict for a minor offence. Had there been a trial on the former indictment for manslaughter, the effect of the evidence in favor of the defendant would probably

have been to secure an acquittal. But for that unfortunate discussion between Mr. Clinton's associate and Mr. Vandervoort, the Clerk, Dr. Brown would probably have had the benefit of being tried on the indictment for the lesser offence. It was quite natural that the deep sympathy of all, including the jurors, should be aroused in favor of the father of Miss Anderson. His recent afflictions were almost enough to crush the most stout-hearted. But a short time before his young daughter left her home, his son, who had enlisted in defence of his country, was brought home a corpse, having been slain in battle. The mother of Miss Anderson, for a long time in ill-health, was so grieved at the loss of her son that she survived the shock but a short time. James Anderson had scarcely buried his wife and son when he was made to mourn the departure of his daughter, whom he was destined never to see again alive, except for five minutes before her death. The danger was that the deep and well-deserved sympathy for James Anderson in his soul-harrowing afflictions would inure to the prejudice of the defendant upon his trial.

The trial of Dr. Brown commenced on the 5th day of October, 1863, in the Court of General Sessions, in the City and County of New York, John T. Hoffman, Recorder, presiding. The following is a report in one of the New York papers of the evidence given by James Anderson :

"Mr. James Anderson, the father of the deceased, was the first witness sworn for the people. The old man walked up to the witness stand, evidently bowed to the ground with grief. As he stepped up to take the oath, the deep sadness of his face seemed at once to magnetize the whole audience, and he clearly had the sympathy of all present—Court, jury, and spectators. His gray hairs, his broken tones, his bowed form and moistened eye softened every heart in the crowded throng before him. As the venerable

witness took his seat, to revive again by narration the melancholy story of his domestic desolation, he could not refrain, before beginning his testimony, from raising his hands to his eyes and weeping. Recovering his composure, the witness proceeded as follows :

“‘I officiate as sexton of the Central Methodist Church. I live at No. 370 Bleecker Street ; I had a daughter, named Clementina Anderson ; she died on the 19th of November, 1862 ; the last time I saw her before her death was on the 25th of October, 1862. When I saw her last in October, she was in excellent health ; from that day until the day of her death I did not know where she was ; she only lived a few minutes after she returned to my house ; she was not able to speak, and did not speak ; she did not live over five minutes ; she was brought home in a carriage between seven and half-past seven o'clock at night. * * * Clementina was twenty years and three months old at the time of her death ; she was not married, to my knowledge. There was a lady in company with my daughter when she was brought home ; she was called at that time, or called herself, Mrs., or Miss, Green ; there were also two men in the carriage.’ [The witness here pointed out Mrs., or Miss, Green in the courtroom as the one present on the sad night of his daughter's return. The woman was Dr. Brown's house-keeper, and is at other times referred to under the alias of Mrs. Gordon.] ‘I asked Mrs. Green, as she called herself, where she brought my daughter from.’ [This evidence was objected to by defendant's Counsel. Objection sustained and evidence stricken out.]

“The District Attorney contended that Green was a confederate and agent of Dr. Brown, and hence the evidence proposed in the witness's question to Green, with her answer at the time, was legal and proper. But the Court adhered to its former ruling, and the evidence was rejected.

“*Cross-examined*: ‘I made a good deal of effort, while my daughter was absent, to find her. Before my daughter's return I asked A. L. Simms where she was. I had an interview with Simms at my brother's house, in Bleecker Street. Simms

was brought there to see me by my brother ; he denied knowing where Clementina was ; I had known Simms but partially before. My daughter spoke to me about eight or ten days before she left about going to Newburg, where my wife died, to see her relations there. I discovered nothing unusual in Clementina at breakfast on the morning she left ; she left in the afternoon ; I came home to dinner, and she was then at home ; when I came home at 5 P.M. my little boy told me she had gone to Newburg. I had a conversation with Simms at the church two or three days before she came home ; he said then he did not know where she was. Simms did not tell my son where my daughter was ; my brother and myself were in the room when my daughter was brought home ; Simms was not there ; there were two men there, strangers to me ; the two men and the woman Green, before referred to, came in together with my daughter ; the three came in with her. *She did not look like a human being ; she looked like a bundle of bedquilts.* I recognized her as they laid her down on the sofa ; I at once remarked Clementina had come ; I told my hired man so. While she was gone I applied to the police for information concerning her, and for aid to recover her. I said to Simms I should not be surprised if she was in this ward.' [Edward Donohue, the hackman who brought Clementina home, was here recognized in the court-room by Mr. Anderson as one of the men who entered his house on the night in question with his dying daughter, and identified.] Several times during Mr. Anderson's painful examination he raised his hands to his forehead and found relief in tears, and as he stepped from the witness stand he looked the very image of desolation, as if life had no further interest for him. Accustomed as we are to the observation of sad spectacles, his appearance truly presented one of the most moving sights we have been called upon to witness for a long time."

The prosecution did not call Simms as a witness, but after calling and examining Coroner Ranney, Dr. Thomas

C. Finnell, Augustus Mann, Jane Shaw, Police Officer David Lindsley, rested.

The defence called only three witnesses—namely, Dr. A. S. Jones, Dr. Charles A. Budd, and Dr. Augustus K. Gardner. Before addressing the jury, Mr. Clinton called upon the District Attorney to state for what grade of offence he should ask a conviction. The District Attorney stated that if the facts proved a reckless disregard of human life, in the sense of the statute, he should ask for a conviction of murder in the first degree; if not, then he should ask for a conviction of murder in the second degree; and if the facts failed to come up to either of these statutory degrees of murder, then he should fall back upon some of the degrees of manslaughter down even to the fourth degree.

Upon the close of the evidence, Mr. Clinton, on behalf of the defendant, addressed the jury. He commenced as follows:

“In opening this case the District Attorney most truly said that it presented a simple and sad story. A more thrilling and heart-rending tale of woe I have never heard. On the evening of the 19th of November last, a man, advanced in years, who had grown gray in well-doing, sat by his family hearth, around which, but a few short weeks before, had gathered, with the rest of his household, the partner of his bosom and his eldest son, both of whom had since entered the realms of eternity.

“The heart of the old man is wrung with anguish; the furrows of age have become deeper, and his hair has grown whiter within these few weeks. He who, for a lifetime, had dealt gently with everybody, finds that Time, whose hand ere this had ever touched him tenderly as a lover’s, is now handling him roughly. The sunshine which had illumined his pathway through life is changed to darkness. The old man is sorely troubled; sorrow encompasses him; evil has befallen him. The family circle which enfolded his exist-

ence is broken. Most of the links in the golden chain of his domestic happiness are no more. His pet child has left her father's roof, and gone—he knows not whither. Long weeks of suspense, of anxiety, of mental torture have intervened. Ah, long indeed ! Long have been the dreary days and sorrowing nights he has awaited her return. Oh, how like Jacob of old he wrestled in prayer for her safety ! He hoped, he feared ; he prayed, he despaired ! He sought and he shunned the protection of the public authorities. He longed to be informed ; he dreaded to know her fate. During sleepless nights, as he tossed upon his couch of misery, he strained his mental vision to pierce futurity ; he prayed that the future might be veiled from his view. He had an agony of desire to clear up the mystery ; he trembled with dismay lest the truth might break in upon him. There sat the old man, on that cold and cheerless night in November last.

“Suddenly the ring of the bell announces the advent of—he knows not whom. A female form borne by strangers greets his vision. It is his long-lost daughter. He thanks God she is back alive. His heart bounds with delight ; his mind, which thus far had remained firm, resting on the solid foundations of Christian faith, now totters with joy. In his confusion he plunges into an adjoining room. He cannot stay ; he must return and gaze upon his child. He does return ; he looks again. Oh, God ! she is dead ! *dead!*

“‘It was a dreadful moment ; not the tears,
The lingering, lasting misery of years,
Could match that minute's anguish ; all the worst
Of sorrow's elements in that dark burst
Broke o'er his soul, and with one crash of fate
Laid the whole hopes of his life desolate.’

“What a picture of woe ! The family altar in ruins ! The *seducer* has wrapped the domestic temple in the flames of everlasting infamy ! Simms, not content with having done his worst to destroy the soul of his victim, has assassinated her memory ! He not only plucked from the diadem of her

pure character the priceless jewel, virtue, but now that she is dead, and her mother is in eternity—a mother who, if living, with God's truth would brand on his forehead, in letters of glowing fire, the words 'Liar! Defiler of the ashes of the dead!'—yes, now that the voice alike of mother and daughter is hushed in the cold and silent grave, he revels in the fond recollection of the triumphs of his lechery, and, in effect, proclaims his victim a willing wanton.

"It would smooth the passage to the grave of that good old man, James Anderson, to believe—to have the world believe—that his daughter was not intrinsically bad—that it was in an unguarded moment she yielded to the blandishments of her destroyer. But Simms would strip him of this last vestige of consolation, and set him adrift upon an ocean

"'Of tideless, waveless, sailless, shoreless woe.'

"God pity that poor old man! Simms, by the damning offence of seduction, robbed James Anderson of his daughter. Your duty to the law, to your consciences, to your oaths, is to see to it that Simms, with heart steeped in gall, with lips blistering with falsehood—rank, foul, and God-defying falsehood—yes, your duty to your consciences is to see to it that this vile seducer, this moral leper, this imp of hell, shall not, through your instrumentality, in violation of law and evidence, rob the daughters of this defendant of a father!

* * * * *

"What a spectacle is presented! A medical gentleman, who is not proved ever to have seen Clementina Anderson, is not only charged, according to the *forms* (in violation of the *spirit*) of the law, with her murder, but the District Attorney, learned, able, and zealous, seeks a conviction for that offence at the hands of a jury. No lawyer familiar with the testimony in this case can, as it seems to me, force the belief in his own mind that it has been *proved* that the defendant caused the death of Clementina Anderson. The whole drift and scope of the evidence of the prosecution,

supposing it all to be true, could have no worse bearing against this prisoner than to show that he *might* have been (not that he *was*) instrumental in procuring a miscarriage with reference to the deceased. So *might* any one of the three or four thousand physicians in this city. So *might* any one of you, gentlemen; so might any one in this courtroom; so might the deceased have caused a miscarriage. Is a physician to be convicted of crime because it is physically *possible* he may be guilty? Suppose a citizen is found dead in the street, stabbed to the heart by an assassin, are you to be convicted of murder because you had the *physical power* to wield the murderous dagger? Suppose a store is robbed, and it is shown that a hundred clerks and employes of the proprietors of that store could have obtained access to it, and could have perpetrated the robbery—are they, each and all of them, to be convicted because it is possible they *might* have been guilty? If the temple of justice is to be profaned and desecrated by the triumph of the principle that in the absence of all *proof* of guilt, a man is to forfeit his life or his liberty because he *might* have been guilty of crime, then woe betide the administration of justice in this country; the last bulwark for the protection of the rights of the citizen is swept away. The forms of law would become ‘a mockery, a delusion, and a snare.’ The only solemnity which would attach to a Court of Justice would be that which ought ever to obtain at a funeral—for Court and jury would become but the pall-bearers of justice. You are sworn to render a verdict according to the evidence. Adopt the principle on which alone this defendant could be convicted—that it is possible he might be guilty—and you convert the sanctuary of the law into a burial-place of conscience, a conservatory of perjury, a hot-house of crime, compared to which the offence imputed to my client is pure as the driven snow.

“You, gentlemen of the jury, are as much interested as the Judge upon the Bench, the learned District Attorney, or myself or any other citizen, in the preservation of those great principles which lie at the foundation of the criminal law—

namely, that one is presumed innocent until *proven* guilty; that the proof of guilt, if it depend upon circumstances, must be—not such as imputes suspicion, not such as shows a probability of guilt—no preponderance of probabilities will be sufficient—but such as proves the guilt beyond all *reasonable doubt*.

* * * * *

“The prosecution have introduced a single medical witness, who performed most of the *post-mortem* examination, and he testified that in his opinion the death of the deceased was caused by an abortion. I presume the learned District Attorney will contend that the pretended abortion was performed by Dr. Brown. The only proof on the subject of the cause of death adduced by the prosecution was that of Dr. Finnell, who testified as I have stated. It follows, therefore, if there is no sufficient proof that the deceased was pregnant, or no proof that an abortion was produced, the prosecution have signally and utterly failed in regard to their whole case. The only pretended proof of the prosecution as to the cause of death is that it was the result of an abortion. If there be no proof of abortion, within the rules of criminal evidence, then there is no proof whatever as to what caused death; for aught that appears, the death of the deceased was natural, and not the result of violence or ill-treatment. Although there ought to be no necessity for so doing, I shall endeavor, by a hasty review of the evidence, to demonstrate the following propositions:

- “1. There is no sufficient proof of pregnancy.
- “2. There is no proof whatever of abortion.
- “3. There is no proof, not the slightest shadow of proof, that the defendant had any, even the remotest, connection with the death of Clementina Anderson.”

Mr. Clinton, by a careful review of the evidence, proceeded to demonstrate these propositions. He made it clear that, assuming all the evidence for the prosecution to be true, there was no proof of pregnancy nor of abortion, nor that defendant was in any way connected with

the death of the deceased. Mr. Clinton concluded as follows:

“Although juries generally render verdicts in accordance with the evidence, yet I am quite aware there are cases where they are borne on the current of prejudice to the rendition of verdicts in violation of law, in violation of evidence, and in direct and flagrant violation of the oath every juror takes when sworn in a cause. I trust this is not to be one of those cases. I will not suppose you capable of disregarding testimony and the rules of evidence which it is the duty of the Court to lay down for your guidance, and which it is your solemn duty to obey. While I do not appeal to your sympathy, but rest the defence of my client on the law of the land—which entitles him to an acquittal—and his entire, absolute, and unqualified innocence, yet I do say that, if sympathy be allowed to prevail on either side of the case, justice and humanity alike demand that it should be awarded to the respectable old physician who is now a prisoner at your bar. Upon a case which should not have deprived him of an hour's liberty, he has been forced to spend nearly a year within the damp and dismal walls of a prison, where he has been compelled to herd with villains, thieves, burglars, murderers, and felons of every grade.

“That a respectable medical practitioner should be compelled to undergo such persecution is an outrage upon justice. During all this time my client has asked, demanded, begged for a trial. After long and weary months of incarceration his cause finally came on. But few jurors answered to their names, and the result was but six in number were impanelled. The defendant, through his Counsel, entreated that his trial proceed. This request was denied. The trial was broken up, and the defendant was sent back to his vile prison, there to remain month after month, to waste away with illness and anxiety, with no better consolation than his innocence. No sooner was he back in his prison than the indictment against him for manslaughter, on which an attempt at trial had been made, was abandoned, and he was

indicted for murder ! With all due respect for the learned District Attorney, I say I never before knew nor heard, in this State, of an indictment for murder in a case of abortion. Both he and I have been engaged in such trials before. I challenge him to point to a single case since the enactment of our statutes on the subject of abortion where any person has been indicted for murder on facts such as the District Attorney has sought to prove in this case. Why such persecution ?

“ Since November last the old man at your bar has been hunted down as though he were a wild beast, to be exterminated from the face of the earth. The hounds of persecution have been upon his track—even that vilest of hounds, Simms, whose company any respectable dog would shun as you would shun famine and pestilence—yes, the hound Simms, combining, as he does, the ferocity of the blood-hound with the sneaking malignity of the hyena, is let loose upon the ‘ old man *innocent*.’ Yes, verily the hounds of persecution have been upon his track ; the public huntsmen have egged them on in the race, until, with blasted prospects, broken health, and bleeding heart, clad in the armor of innocence, he has been driven—no, not driven, he has fled—for protection to the temple of justice. He is here at her holiest altar. You are her ministers—her high-priests. In the name of law, in the name of a common humanity, as you hope for mercy at that dread day when the archangel shall sound the last trump and the graves shall yield up their dead, I adjure you, deal fairly with that old man ! Pierce him not with the sword of persecution ! With pen dipped in the gall of prejudice, write not ‘ Felon ’ on his brow ! He comes not before you loaded with the seducer’s guilt. He never, by the outward form of honorable courtship, won the heart of a pure, innocent, and guileless girl, only to add one more to the long list of victims of his demoniac lust ! *He* is not the seducer of Clementina Anderson ! Let not the unparalleled persecution of an innocent man divert your attention, your burning indignation, your unutterable loathing, your never-ending execrations

from the author of her seduction—the hell-branded architect of her ruin !

“Great God ! What must have been the emotions of that poor girl after the fell seducer had compassed her ruin ! Weary of life and fearful of death ! As she contemplated the loss of all which endeared her to life—the indelible stain upon her hitherto pure character, the loss of friends, the finger of scorn ever to be pointed at her, the dreary waste of existence ; sometimes tempted to revolve in her mind the fearful crime of suicide—I can almost fancy I hear her exclaim, in the language of one of England’s favorite bards :

“ ‘ Shall I kill myself ?

What help in that ; I cannot kill my sin,

If soul be soul ; nor can I kill my shame.

No, nor by living can I live it down ;

The days will grow to weeks, the weeks to months,

The months will add themselves and make the years,

* * * * *

And mine will ever be a name of scorn.’

“What emotions crowd the mind and surcharge the heart as we contemplate the part performed by Simms, a willing instrument of the monarch of hell, in casting the pall of death over virtue—the vital godliness of the female character. The only asylum which bade her welcome was the grave. Could Simms have seen the humble coffin containing her lifeless remains as it sank into the cold earth, and could but a glimmering ray of the light of conscience have pierced the dark portals of his soul, who could have portrayed the remorse that would have encircled his existence and enshrouded his future. Even now, cast upon the sea of life, secure as he fancies himself in his ice-bound indifference, devoid to all appearance of the instincts of humanity—let him beware ; for the time will come when conscience will overtake him, and Almighty God will remind him of the enormity, the gigantic turpitude, of his conduct, as in his uprisings and down-sittings, at all times, in all places, under all circumstances, he will behold indelibly stamped on his existence, as though

in characters of blood emblazoned on canvas and thrown across the sky, the words ‘Seducer ! Destroyer of innocence ! Murderer of family peace !’

“ Hereafter, as he seeks to hide from his crime behind the ever-shifting scenes of life ; as he endeavors to drown conscience, perchance in the intoxicating bowl ; as he essays to change one pursuit for another, to fly from place to place, in the vain hope that he may no longer behold the emaciated form, the hollow cheek, the sunken eyes—with their glare of death—of his victim, he will be ready to exclaim, with his great prototype—the Prince of Darkness—as drawn by the almost inspired bard :

“ ‘ Which way shall I fly ?

* * * * *

Which way I fly is hell ; myself am hell ;
And, in the lowest deep, a lower deep,
Still threat’ning to devour me, opens wide,
To which the hell I suffer seems a heaven.’

“ Gentlemen of the jury, I appeal to you as the guardian angels of domestic purity ! Suffer not the records of this Court to be defiled with a verdict of guilty, which, properly understood, can only gladden the heart of the fiendish wretch who has done his worst to write ‘Wanton’ on the tombstone of Clementina Anderson.

“ Gentlemen, while with moistened eye and bleeding heart you commiserate the sad fate of *her* father, forget not that my client is an old man. He has motherless daughters dependent on him for protection and support. As the ivy clings to the oak, so the tendrils of affection are wound around the heart of *that* old man. Humanity—justice—law—with unmistakable voice, call upon you to restore to the defendant’s daughters their kind, fond old father.”

At the close of Mr. Clinton’s address, A. Oakey Hall, District Attorney, made an able and eloquent address to the jury on behalf of the prosecution. Recorder Hoffman charged the jury very strongly in favor of

conviction. The drift of his charge was against a conviction for murder, but in favor of a conviction for manslaughter. But for the indiscretion of ex-Judge Stuart, previously referred to, the doctor would have been tried on an indictment for manslaughter. The result would undoubtedly have been an acquittal. The disadvantages of going to trial on an indictment for murder were very great. The jury would be very apt to think that if they refused to sustain the contention of the prosecution, that the case was one of murder either in the first or second degree, or, if not murder, it was a case of manslaughter in one of the higher degrees, they were very liberal to the defence; and that a conviction for manslaughter in the fourth degree, the lowest grade of homicide known to the law, would be a substantial victory for Dr. Brown. Although the evidence entitled him to a verdict of acquittal, it was not strange, under the circumstances, that the jury rendered a verdict against him of manslaughter in the fourth degree.

CHAPTER XXI

FLORENCE SEWING-MACHINE COMPANY AGAINST WARFORD & VANDEVEER

Suit brought in the Superior Court of the City of New York to
Recover Five Thousand Dollars' Worth of Sewing-machines, Hypothecated with Defendants for Large Advances made by Them.
—The Issue before the Jury was whether Plaintiff's Clerk, who Hypothecated the Goods, Committed a Larceny, or was Guilty only of Breach of Trust.—Tilt between Edwards Pierpont, Counsel for Defendants, and Mr. Clinton, Counsel for Plaintiff.
—The Result of the Trial.

THE Florence Sewing-machine Company had a store and place of business in the city of New York. Its manufactory and principal place of business were in Florence, Massachusetts. One Buell, their clerk, who had charge of the business in New York, when he received for the company sewing-machines sent from their manufactory, was in the habit of having them stored elsewhere when there was not sufficient room for them in the company's place of business. The company had entire confidence in him; yet he turned out to be dishonest. He hypothecated a large quantity of machines as security for five thousand dollars, which he obtained and appropriated to his own use. The machines were stored with William K. Warford and Henry Vandever. The Sewing-machine Company, upon ascertaining these facts, brought suit in the Superior Court of the city of New York and took the goods upon a writ of replevin. The suit was based upon the ground that the defendants acquired neither

a title to the goods nor any lien upon them, for the reason that the taking of them by the clerk, and appropriating them to his own use, under the circumstances, amounted to constructive grand larceny. It was not claimed that the defendants knew that the goods had been stolen, nor that they had any reason to believe that such was the fact. On the trial (in January, 1868), at which Judge Samuel Jones presided, the case, on the part of the plaintiff, was conducted by Mr. Clinton, while Joseph H. Choate and Edwards Pierrepont (of large experience in public life, who, at different periods of his career, was Judge of the Superior Court, United States District Attorney, Attorney-General of the United States, and Minister Plenipotentiary to the Court of St. James) conducted the defence. Mr. Clinton, in opening the case to the jury, stated the circumstances under which the clerk had appropriated the sewing-machines in question to his own use, and claimed that he (the clerk) had stolen the goods. Mr. Pierrepont arose, and, with some excitement, asked the Court to restrain Mr. Clinton from making such slanderous statements against the defendants as that they had been guilty of receiving stolen goods. Judge Jones remarked that he saw no reason to interfere with Mr. Clinton in his opening; that it must be assumed that he understood his side of the case; that if he were to overstate or misrepresent it he would injure his own client. The evidence on the part of the plaintiff consisted of a variety of facts and circumstances showing, or tending to show, that the clerk, in appropriating the goods, committed larceny. If so, the defendants could acquire no title to, nor lien upon, the property in question. If the clerk, when he obtained possession of the goods, intended to appropriate them to his own use, the case was one of larceny, and the plaintiff would be entitled to a verdict; if he did not at that time intend to appropriate

them, but formed the intent afterwards, the case was not one of larceny, but of breach of trust or of false pretences, and the defendants would be entitled to a verdict.

The following are some of the leading facts shown by the evidence on the part of the plaintiff. Its clerk, Buell, had the entire charge and management of the company's store in New York. He was called its principal agent for the State of New York. He hired the clerks and other employes necessary for carrying on the business of the store, and received a salary of three thousand dollars per annum as entire compensation for his services. The business was carried on in the name of the plaintiff. Goods from the manufactory were directed to the "Florence Sewing-machine Company, No. 505 Broadway, New York." Buell kept an individual bank account, to the credit of which he deposited the proceeds of sales; and he drew upon this account to pay the expenses of the store. After deducting expenses of the business, the proceeds of the sales were to be remitted to the plaintiff. Buell, on the 31st of July, 1866, obtained from one Woodhouse his promissory note, payable in ninety days, for five thousand dollars. The note was for Buell's individual use. He promised Woodhouse to protect the note; and he agreed to place in his hands as security eight thousand dollars' worth of sewing-machines. In order to get the machines, to comply with this agreement, he wrote the plaintiff at Florence, Massachusetts, falsely representing that he had orders from Dodd & Hill for seventy machines, which were to be sent to them at the West Indies. In this way he obtained from the plaintiff, at different times between the 31st of July, 1866, and the 22d of October following, eighty-three machines, which were shipped from plaintiff's place of business at Florence, Massachusetts, and marked "W. Care Florence Sewing-machine Company, No. 505 Broadway, New York." They never reached the New York store, but

were turned over to Woodhouse for Buell's individual benefit. Seventeen other machines, by Buell's direction, were taken from plaintiff's store in New York by a cartman not known to the other employes, and not in the regular course of business. Buell pledged these seventeen machines to Woodhouse as security for his personal debt. By direction of Buell the book-keeper counted these seventeen machines, as well as the eighty-three previously turned over to Woodhouse, as on hand; and by direction of Buell the book-keeper so reported them in his reports to the officers of the company. Upon being interrogated subsequently by the officers of the company, Buell made false statements to them in respect to these machines. Under the arrangement with Woodhouse, Buell stored the machines with Warford & Vandever, the defendants, and the warehouse receipt was issued to Woodhouse. In December, 1866, Woodhouse pledged the same machines to the New York Warehouse Security Company for a loan of five thousand dollars. In order to get the loan, Woodhouse delivered up his warehouse receipt, and obtained another in the name of the Warehouse Security Company. At the time of the commencement of the suit the one hundred machines were stored with the defendants, and were taken by the Sheriff on a writ of replevin.

Repeatedly during the progress of the evidence for the plaintiff, Mr. Pierrepont moved to dismiss the case. He was not content to wait until the plaintiff's evidence was all in. So sure was he that the case must be dismissed, he thought it a waste of time to continue the trial. His motions were denied. When the evidence for plaintiff closed, Mr. Pierrepont, thankful that the time had arrived to end such a preposterous and outrageous case, with an earnestness which showed he had no possible doubt of success, moved for a non-suit. His motion was denied, and Mr. Choate opened the case to the jury.

Upon the close of the evidence Mr. Pierrepont addressed the jury on the part of the defendants. In the course of his observations he said that while he and his associate, and lawyers generally, if cognizant of the facts, would not be able to see any evidence of larceny or crime of any kind, yet Mr. Clinton, having had so much experience in the conduct of criminal cases, could perhaps see crime, however invisible it might be to other lawyers. Mr. Clinton addressed the jury on behalf of the plaintiff. In the course of his comments upon the evidence, in referring to the criticism of him by Mr. Pierrepont, the following is substantially what occurred :

Mr. Clinton. "Judge Pierrepont's experience in criminal cases of late years far exceeds mine. He has the cream of the practice. Those charged with offences against the Government rush to retain him. Every traitor sent to Fort Lafayette or other place of imprisonment in hot haste secures his professional services. In fact, Judge Pierrepont has become the common refuge of the scoundrels, criminals, and traitors that infest our country. It ill becomes him to talk as he has about the delays during the progress of this trial. I remember that the trial of Surat, in which he was Counsel, began a long time ago and continued for I don't know how many months. It may be running on now."

Mr. Pierrepont. "But I acted for the prosecution."

Mr. Clinton. "I know you did ; that is the only reason Surat was not convicted." [Turning to the jury, Mr. Clinton continued :] "Gentlemen, if you ever have an unfortunate relative or friend who is involved in criminal complications, and he gets indicted for a criminal offence, after you have exhausted in vain every effort which wisdom or ingenuity can suggest to extricate him from his troubles, and it looks as if conviction and swift punishment for an infamous offence were sure, and there is no hope for him, *just hire Judge Pierrepont to prosecute him, and he will be saved.*"

After the Judge had charged the jury, they retired,

and soon after returned and rendered a verdict for plaintiff, assessing the value of the property at seven thousand dollars.

As the jury, in announcing their verdict, said "For the plaintiff," Mr. Pierrepont jumped up and said, "For the defendants, I presume, the jury mean." Said the foreman, very emphatically, "*No, we don't.*"

The defendants appealed the case to the General Term of the Court, and the judgment below was affirmed. The case is reported in 1st Sweeny's Superior Court Reports, 433. The opinion of the Court was delivered by Judge Freedman, in which he explained, with great clearness, the distinction between obtaining goods through a larceny and obtaining them by false pretences. He held that, although no title to goods could be obtained through the perpetration of a larceny, yet the rule was otherwise when goods were obtained by means of false pretences. He held that in this case the undisputed facts and circumstances were such as to justify the verdict of the jury—that the clerk of plaintiff was guilty of larceny, and not of the offence of false pretences in respect to the goods in question—and that the defendants, therefore, had no title to the goods nor lien upon them.

Mr. Pierrepont had too much good sense to take offence at the sharp retort of Mr. Clinton above stated, which he had provoked. When they met, a few days afterwards, Mr. Pierrepont said to Mr. Clinton: "I wish you would give me a reference to the authorities you cited against me in the Florence Sewing-machine case. I am retained in a case in which I desire to maintain the same position you did. I want to see if with *your law* I can beat my opponent as badly as you beat me."

Mr. Clinton furnished Mr. Pierrepont with a reference to the desired authorities, but what success he met with in using them Mr. Clinton never heard.

CHAPTER XXII

CASE OF WATSON AND CRARY

Indicted for Violation of the Internal Revenue Laws in Selling Whiskey on which the Tax was not Paid.—The Jury Impanelled and Discharged against the Objection of Mr. Clinton, Defendants' Counsel.—The Trial Subsequently Brought on.—Objection made by Mr. Clinton that the Discharge of the Jury was Tantamount to an Acquittal.—Motion on Behalf of Defendants that Judgment of Acquittal be Formally Entered on Record.—Decision of the Motion by the Court.

AFTER our Civil War, when the Internal Revenue tax on whiskey was two dollars a gallon, it sold in the open market for less than the tax. Indictments in the city of New York against those engaged in the whiskey trade at that time were frequent. Among the persons indicted were Ethan L. Watson and George D. Crary, of Watson, Crary & Co., one of the most respectable and prominent firms in the trade. Their trial was brought on in the United States District Court in the city of New York on the 10th of June, 1868, and a jury was impanelled. Samuel G. Courtney, United States District Attorney, appeared for the Government, and Mr. Clinton appeared for the defence. An adjournment was had until the next day, at which time, the United States District Attorney not being ready, the case was adjourned until the 19th of June. It was not reached until the 23d of June, at which time the Counsel on both sides were in attendance. Mr. Bell, Assistant United States District Attorney, announced that the Government was not ready to proceed, and moved that the trial be postponed until

another term of the Court, and that he have leave to withdraw a juror. The Court, against the strenuous opposition of Mr. Clinton, granted the motion. In the following autumn there was no little excitement with regard to the whiskey cases. Mr. Courtney was criticised for not pressing more earnestly their prosecution. He determined at once to enter upon a vigorous campaign against those indicted. In order to show that the most respectable, prominent, and wealthy firms in the business were no more favored than the others, the first case he selected for trial was the one against Watson and Crary. On the 9th of November he moved on the trial. Upon the application of Mr. Clinton it was postponed until the next day, at which time the District Attorney again moved that the trial proceed. Mr. Clinton and Clarence A. Seward appeared on behalf of Watson and Crary. Mr. Clinton objected on the ground that defendant Crary was at his house in New Jersey, too ill to attend. Judge Blatchford, who presided, suggested that the jury might be impanelled, and that the actual trial need not begin until Mr. Crary was well enough to attend. Mr. Clinton objected, stating that he desired to have the defendant Crary present at the impanelling of the jury. He said, however, that there was a preliminary motion he desired to make, which might be argued in the absence of Mr. Crary. To this the District Attorney assented, and asked what the motion was. Mr. Clinton said that he should move the Court to direct that judgment of acquittal of the defendants be entered upon the record, because in law they were already acquitted by reason of the jury formerly impanelled in the case having been discharged without their consent. Mr. Clinton thereupon proceeded with his motion. He stated that the proceedings which took place in the Court appeared by the following extract from the minutes of the Clerk:

“June 23d.

“The trial of the above-named defendants [Watson and Crary] being resumed,

“Mr. Bell, Assistant United States Attorney, moves that the trial go off for the term, owing to the illness of the United States Attorney and the absence of witnesses for the prosecution.

“The Court thereupon directs a juror to be withdrawn, and the trial is accordingly postponed for the term.

“A copy from the minutes.

“GEO. F. BETTS, *Clerk.*”

The following are the principal points argued by Mr. Clinton :

1. The objection to any further proceedings properly comes before the Court by way of objection to any further or second trial.

In support of this point Mr. Clinton cited the following authorities: *Klock v. People*, 2 Parker's Crim. Rep., 680; *United States v. Haskill*, 4 Washington's Rep., 411.

2. The power of the Court to discharge a jury is the same in misdemeanors as in felonies. The rules of law are the same. The *subjects* on which the discretion of the Court can legally operate, with reference to the discharge of the jury, are the same in misdemeanors as in felonies. The *causes* for which the Courts may discharge a jury are the same in misdemeanors as in felonies.

The following authorities were referred to on this point: *People v. Barrett*, 2 Caines, 304; *United States v. Haskill*, 4 Washington's Rep., 402.

3. It is not necessary that it affirmatively appear that the defendants objected to the withdrawal of a juror, or to the entry of a *nol. pros.*, after a jury are impanelled and sworn. It is enough if it do not affirmatively appear that the defendants consented.

On this point Mr. Clinton cited the following authorities: *United States v. Schumaker*, 2 McLean, 114; Page

v. The State, 3 Ohio State Rep. (Warden & Smith), 238; *People v. Barrett*, 2 Caines, 304; 2 Parker's Crim. Rep., 676; *Dwarris on Statutes*, 634-35; *Daggett v. State*, 4 Conn. Rep., 60, 63; *Schooner Enterprise*, 1 Paine C. C. Rep., 32; *Elam v. Ransom*, 21 Georgia, 139; *Rex v. Wade*, 1 Moody's Crown Cases, 86; *Cancemi v. People*, 18 N. Y. Rep., 137.

4. The withdrawal of a juror and the discharge of the jury under the circumstances disclosed by the records in the case at bar are equivalent in law to the acquittal of the defendants.

On this point Mr. Clinton relied on the following authorities: 2 Russell on Crimes, 969; 1 Chitty's Crim. Law, 631; *McFadden v. Commonwealth*, 23 Penn., 12; *People v. Barrett*, 2 Caines, 304; *People v. Goodwin*, 18 Johnson, 206; *Klock v. People*, 2 Parker's Crim. Rep., 676; *Grant v. People*, 4 Parker's Crim. Rep., 527; *United States v. Schumaker*, 2 McLean, 114; *Commonwealth v. Wade*, 17 Pick., 395; *Mount v. The State*, 14 Ohio, 295, 302; *State v. McKee*, 1 Bailey, 651; *Wright v. State*, 5 Indiana, 290; *Reynolds v. State*, 3 Kelly, 53; *Poage v. State*, 3 Ohio State Rep. (Warden & Smith), 239.

The following cases show some of the causes for which a jury may be legally discharged without rendering a verdict: *United States v. Coolidge*, 2 Gallison, 364; *United States v. Haskill*, 4 Washington's C. C. Rep., 402; *United States v. Morris*, 1 Curtis Rep., 23; *United States v. Perer*, 9 Wheaton, 579.

5. Mr. Clinton contended that, according to the uniform current of authority, the discharge of the jury in the case at bar was equivalent to an acquittal; that there was not a single recognized authority to the contrary; that the objection to any further or second trial was well taken; that the defendants were entitled to be discharged; that their bail should also be discharged

and a formal judgment of acquittal entered upon the record.

The District Attorney made an able and vigorous argument in opposition to Mr. Clinton's motion. The Court reserved its decision. Two days afterwards Judge Blatchford rendered a decision granting the motion. The following opinion was delivered by him :

“This is an indictment found under the 45th Section of the Act of July 13, 1866, and charges the defendants in substance with aiding and abetting in the concealment of thirteen barrels of distilled spirits, which had been removed from a distillery to a rectifying establishment which was not a bonded warehouse. The punishment for the offence is a fine of not less than two hundred dollars nor more than one thousand dollars, or imprisonment for not less than three nor more than twelve months. The minutes of this Court show that the indictment being pending thereon, a trial of the indictment was, on the 10th of June, 1868, ordered on the motion of the District Attorney ; that on that day twelve jurors (whose names are set forth in the minutes) were sworn in the case ; that the case was then adjourned to the next day ; that on the next day (June 11) the case was called, and that, by reason of the illness of the District Attorney and the absence of witnesses for the United States, the trial was adjourned, and the jurors impanelled therein were continued until the 19th of June following ; that on the 23d of June following, the trial being resumed, the Assistant District Attorney moved that the trial go off for the term, owing to the illness of the District Attorney and the absence of witnesses for the prosecution, and that the Court thereupon directed a juror to be withdrawn, and the trial was accordingly postponed for the term. The indictment now being called up again for trial, the defendants object to any further or second trial, and move for the discharge of the defendants and of their bail on the ground that the above proceedings set forth in the minutes of the Court are equivalent

in law to an acquittal of the defendants on a trial of the indictment. The motion is made on the foregoing minutes. There can be no doubt that a Court of the United States has authority in a criminal case to discharge a jury from giving a verdict, whenever in its opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or when the ends of public justice would otherwise be defeated, and it may do this without the consent of the defendant; but the Court is to exercise a sound discretion on the subject, and to use the power with the greatest caution, under urgent circumstances, and for very plain and obvious causes. (*United States v. Perer*, 9 Wheaton, 579.) If the Court may exercise this authority in a criminal case without the consent of the defendant in a case of manifest necessity, it may do so with the consent of the defendant in a case which falls short of being one of manifest necessity. In the present case the minutes of the Court show that the reason for postponing the case from the 11th to the 19th of June was the same as that for postponing the case indefinitely on the 23d of June, and for directing a juror to be withdrawn—to wit, the illness of the District Attorney and the absence of witnesses for the United States. The minutes do not show any assent by the defendants to the withdrawal of the juror or any dissent from that course. I am satisfied that I must have understood the defendants by their Counsel as consenting to the course that was pursued; otherwise the question of the effect of their not consenting would have been presented at the time, and they would have insisted then and there upon their right to a verdict of acquittal. No such verdict was asked for, nor was the question presented to the Court as to what effect the want of consent by the defendants to the withdrawing of a juror would have as to a future trial. Although the Counsel for the defendants may have urged their desire to proceed with the trial, and have dwelt on the hardship of the postponement, still I regarded them, and doubtless the District Attorney did, in the absence of any motion on their part for the entry at the time of a verdict for acquittal, as in effect

consenting to the withdrawal of a juror. If the District Attorney did not choose to proceed with the trial after the jury were sworn and impanelled, the defendants had a right then and there to ask for a verdict of acquittal. If they had asked for such a verdict, the District Attorney might, in preference, have gone on with the trial. Still the defendants were not bound to ask at the time for such a verdict. They have a right now to claim that what took place was in effect such a verdict. The fact that the Court and the District Attorney regarded the defendants as consenting to the course that was taken ought not, in the absence from the minutes of the Court of any statement that they consented, to conclude them. If the Court, acting at the time on its understanding that the defendants in effect consented, had proposed to make in the minutes of the Court an entry of such consent, it may very well be that the Counsel for the defendants would have at once insisted on the right of the defendants to a verdict of acquittal. Then the Court would have been called upon to pass upon the sufficiency of the reasons assigned in the minutes for withdrawing a juror—the illness of the District Attorney and the absence of witnesses for the prosecution. The Court must be governed as to the facts in this matter by its minutes. They were made by the Clerk in the usual course of the business of the Court, without the special attention of the Court having been called to them, and without any motion having been made by the District Attorney at the time to enter as a part of them that the defendants consented to a withdrawal of the juror. It would be very unsafe, and lead to endless disputes and probable injustice, for the Court in matters of this kind to act on its own recollection or on the affidavits of witnesses, especially after a lapse of time. If the parties to any suit or proceeding find that the minutes of the proceedings of the Court kept by the Clerk, and which are always open to inspection, are erroneous, the proper way is to move to correct them promptly to comport with the facts. It must, therefore, be assumed for the purposes of the present application that there was no consent by the de-

fendants to the withdrawal of the juror. The question, then, recurs, whether the reasons assigned in the minutes of the Court for withdrawing a juror show a manifest necessity for doing so, or that the ends of public justice would otherwise have been defeated. The question must be disposed of now as it would have been disposed of at the time the motion was made that the trial go off for the term, if the defendants had then expressed their dissent to such action. The illness of the District Attorney, it not appearing by the minutes that such illness occurred after the jury were sworn, or that it was impossible for the Assistant District Attorney to conduct the trial, and the motion to put off the case for the term being made by such assistant, cannot be regarded as creating a manifest necessity for withdrawing a juror. So, too, as to the absence of witnesses for the prosecution: it does not appear by the minutes that such absence was first made known to the law officer of the Government after the jury were sworn, or that it occurred under such circumstances as to create a plain and manifest necessity, justifying the withdrawal of a juror. The mere illness of the District Attorney, or the mere absence of a witness for the prosecution, under the circumstances disclosed by the record in this case, is no ground upon which, in the exercise of a sound discretion, a Court can, on the trial of an indictment, properly discharge a jury without the consent of the defendant, after the jury has been sworn and the trial has thus commenced. To admit the propriety of the exercise of the discretion on such grounds would be to throw open a door for the indulgence of caprice and partiality by the Court to the possible and probable prejudices of the defendant. When the trial of an indictment has been commenced by the swearing of the jury, the defendant is in their charge, and is entitled to a verdict of acquittal if the case on the part of the prosecution is for any reason not made out against him, unless he consents to the discharging of the jury without giving a verdict, or unless there is such a legal necessity for discharging them as would, if spread upon the record, enable a Court of Error to say that the discharge was proper. (Whar-

ton's Criminal Law, Ed. 1852, page 213.) It is impossible within this definition to lay down any inflexible rule as to what causes would and what causes would not be sufficient to warrant the exercise of the discretion which the Court possesses. It is sufficient to say that in no case to be found in the books has any such reason as is spread upon the record in this case been admitted, in the absence of the consent of the defendant, to be a proper ground for discharging a jury after they have been sworn and impanelled to try an indictment. To hold now that the record of the proceedings of the Court on the former trial amounts to a verdict of acquittal is to do just what the Court would have done at that time on the facts stated in the record. If I had any doubt as to the propriety of this course I should resolve it in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion. But the weight of all the authorities on the subject is that the position of this case, as it stood when the juror was withdrawn, entitled the defendants, in the absence of their express consent to any other course, to a verdict of acquittal, and therefore entitles them to the action of the Court at this time on their application to the same effect. An order will, therefore, be entered, declaring that the proceedings on the former trial are held to be equivalent to a verdict of not guilty, and discharging the defendants and their bail from further liability in respect to the indictment."*

* The attempt of Judge Blatchford to show that he and the District Attorney must have considered that the Counsel for Watson and Crary consented to the withdrawal of a juror is extraordinary. This implies :

1. That the Clerk was guilty of gross and unpardonable negligence in not entering such consent upon the minutes.

2. That the District Attorney was grossly negligent in not insisting that such entry should be made.

3. That the opposition of the Counsel of Watson and Crary to the postponement of the trial was in effect a consent that it be postponed and that a juror be withdrawn.

It would have been impossible for Counsel for defendants to oppose an adjournment of the trial more strongly than was done on that oc-

casian. It did appear to the Court on the motion, by the statement of Assistant District Attorney Bell, that at the time the juror was withdrawn Counsel for defence "urged the hardship of the case—urged the fact that the defence had witnesses from another State, and that he was ready and anxious to go to trial." How this language could be construed to mean a consent to the postponement of the trial and the withdrawal of a juror is incomprehensible.

CHAPTER XXIII

CASE OF ROBERT J. GAMBLE AND MATILDA HUJUS

Both Charged with Murder (by Poison) of the Wife of Gamble.—
A Very Remarkable Case.

THE following is a correct account of the prosecution, or rather persecution, of Robert J. Gamble and Mrs. Hujus, wife of Dagobert Hujus, given in the *New York Daily Times* of December 3, 1868:

“THE GAMBLE CASE AGAIN

“In June last Robert J. Gamble and his wife purchased of Mr. and Mrs. Hujus a farm in Clarkstown, Rockland County. Up to this time Mr. and Mrs. Gamble and Mr. and Mrs. Hujus were entire strangers. Mr. and Mrs. Gamble took possession and commenced their residence in Clarkstown. Mr. and Mrs. Hujus were about leaving and taking board elsewhere, but were finally persuaded by Mr. and Mrs. Gamble to remain with them for a while. Very soon Mrs. Gamble, who for years had been addicted to habits of intemperance, was taken sick; her husband sent for the nearest physician—Dr. Van Houghten. Mrs. Gamble gradually failed in strength and became worse. On the 2d of August she died, and was soon afterwards buried in Greenwood Cemetery. Before Mrs. Gamble’s decease she made a will leaving all her property to her husband. Her relatives were disappointed and embittered against him. Before Mrs. Gamble was buried, Peter Stephens, Esq., of Nyack, Rockland County, as Deputy Coroner, was notified of her death, and was informed that she died somewhat suddenly. He was told that no physician attended her during

her illness. Under these circumstances Deputy Coroner Stephens considered it his duty to investigate the case before permitting the body to be taken to Greenwood. Upon examining into the facts, he ascertained that the deceased had not died suddenly, but had been ill four or five weeks; that she had been attended during her entire illness in Rockland County by Dr. Van Houghten, and had been visited the day preceding her death by Dr. Polhemus, of Nyack, both very competent physicians, and that her death was caused by the excessive use of alcoholic drinks. Coroner Stephens then gave the necessary burial permit, and the remains of Mrs. Gamble were taken to Greenwood and interred. The relatives of Mrs. Gamble caused the corpse to be disinterred on the 14th day of August. Coroner Flavin, of Brooklyn, impanelled a jury and commenced holding an inquest. A *post-mortem* examination was made. A portion of the body, including the stomach and its contents, was received by Dr. Doremus for analysis. Without waiting for the result, the relatives of Mrs. Gamble made a complaint before Justice Bogert, of Nanuet, Rockland County, against Mr. Gamble and Mrs. Hujus, charging them with having caused the death of Mrs. Gamble by means of poison. Mr. Gamble and Mrs. Hujus were arrested and imprisoned in the jail of Rockland County. The parties asserted their entire innocence, and by their Counsel, C. P. Hoffman, Esq., demanded an examination. The investigation proceeded rather slowly before Justice Bogert, until the latter part of September, when Henry L. Clinton, Esq., was retained by the defendants, after which the most vigorous and persistent efforts were made by the defence to press the examination to a close. The relatives of Mrs. Gamble employed Counsel (Messrs. Chauncey Shaffer and Henry Dailey, Jr.), who were indefatigable in their efforts to present evidence against the accused. Frequent and long sittings were had before Justice Bogert. Every opportunity was afforded the prosecution, and extraordinary latitude was given. The Justice allowed the prosecution to give evidence upon every subject, however remote, which could have any bearing upon

the case. The circumstances connected with the will of Mrs. Gamble and the execution by her of deeds of her property were investigated with great particularity. At a very early stage of the investigation it was evident that the great subject of interest on the part of the relatives was the property the deceased left. Before the Justice concluded the investigation the relatives commenced suits to obtain for themselves the real estate which Mrs. Gamble, through third parties, conveyed to her husband. The prosecution called as witnesses Drs. Van Houghten and Polhemus, who testified that the deceased died a natural death, and that her death was caused by the excessive use of alcoholic drinks. The evidence of the prosecution established very clearly the innocence of the accused. Dr. Doremus testified that his analysis showed that the stomach of the deceased contained, as near as he could estimate, about a fortieth part of a grain of *morphiæ*, and that this quantity was entirely harmless. Dr. Van Houghten testified that he administered to Mrs. Gamble *morphiæ* during her illness, and that he gave her, some four or five hours before her death, about three-quarters of a grain. The defence were anxious to introduce evidence before the Justice, but were afforded no opportunity to do so without incurring the hazard of their clients being kept in prison for months to come. There are but two terms a year of the Oyer and Terminer in Rockland County—one being held in October, the other in April. Notwithstanding the determined efforts of the Counsel for the defence to push on the case and compel the prosecution to close their evidence, so that testimony could be introduced on behalf of the accused, the Counsel for the relatives would not and did not rest their case until the 20th of October. The Oyer and Terminer for Rockland County commenced the day before (October 19), and ended on the 21st. The Counsel for the defence could not introduce any evidence, without incurring the risk of the examination being protracted until the next term of the Court in April. Justice Bogert, therefore, had to decide the case upon the evidence of the prosecution. He dismissed the case, and honorably discharged the parties, on

the ground that the testimony showed that the deceased died a natural death, and that there was no evidence inculcating the accused. The case was then laid before the Grand Jury of Rockland County, and that body, after examining the witnesses, came to the same conclusion as Justice Bogert, and refused to find an indictment."

The parties having been triumphantly vindicated by the Magistrate and the Grand Jury, had a right to expect that they would be subjected to no further persecution. Their innocence of all complicity in the death of Mrs. Gamble had been conclusively established. But with venomous ingenuity a plan was concocted to deprive them of the benefits of the decision of the Magistrate and the action of the Grand Jury. An attempt was made, on the application of Michael Murphy, a brother of Mrs. Gamble, to revive the proceedings before Coroner Flavin in Brooklyn. For months these proceedings had been suspended. In August previous, the Coroner having impanelled his jury, and proceeded so far as to have a *post-mortem* held, and the stomach and its contents delivered to Professor Doremus for analysis, the relatives of the deceased should have awaited the result of that analysis, and not have rushed in hot haste, as they did, before Justice Bogert with a charge of murder. As by their action the proceedings before the Coroner were suspended, before his jury had been furnished with evidence as to the cause of death, there was no justice in reviving these proceedings; and but one construction could be put upon the course taken. The object was to implicate Gamble and Mrs. Hujus. Although the law gives a Coroner no power to arrest parties until his jury have rendered a verdict against them, yet Coroner Flavin, before he had again called his jury together, caused Gamble and Mrs. Hujus to be arrested in Rockland County, on the 7th of November, 1868, and brought to Brooklyn. Mr. Clinton attended

before the Coroner, and denounced the proceedings as a gross and flagrant outrage. He stated to the Coroner that he had no right nor authority whatever to arrest the parties; and, furthermore, that he had no jurisdiction to hold an inquest. The Coroner, apparently having unbounded confidence in his own judicial wisdom, answered that he would take the responsibility. He, however, did not keep the parties in custody, but allowed them to depart upon condition that they would be present at the inquest. If the inquest should be held, Counsel for Gamble and Mrs. Hujus, although they might attend, would have no legal right to cross-examine witnesses called by the Coroner or to produce witnesses in defence of their clients. Should the Coroner produce testimony implicating Gamble and Mrs. Hujus, however inconclusive or even false such testimony might be, they would have no right to adduce evidence to contradict or disprove it. To thus subject them to the peril of arrest upon the verdict of the Coroner's Jury, and consequent imprisonment in the jail of Rockland County until the next term of the Oyer and Terminer in that county—which was then nearly six months off—would have been an unprecedented outrage. Yet it was evidently thought that such a scheme could be easily executed. It would have been in vain to appeal to the Coroner to indefinitely postpone further proceedings. The fact that practically the innocence of the parties had been established by the decisions of the Magistrate and the Grand Jury did not even prevent him from illegally causing their arrest. But how to rescue them from the clutches of the Coroner was the question. The law gives no right to a Coroner to hold an inquest upon the body of one who died in another county. Mrs. Gamble did not die in Kings County; therefore, no Coroner of that county could legally hold an inquest. Even if Coroner Flavin had possessed jurisdiction, and had the power in his dis-

cretion to arrest, his action was entirely without justification in arresting these parties, and thus assuming that they were guilty; when, with the zeal of relatives, and with the aid of able Counsel, a prosecution before Justice Bogert, which had lasted for months, and in the course of which the widest latitude of evidence had been permitted, had resulted in a failure to establish a *prima facie* case. When to this condition of affairs was added the fact that Coroner Flavin had no jurisdiction to hold an inquest in the case any more than if the deceased had died in Europe or Asia and had never stepped foot on American soil, the outrage contemplated upon the rights of the parties deserved the severest rebuke in the power of the Courts to administer. Mr. Clinton at once, upon due proof of these facts, applied to Judge Gilbert, of the Supreme Court, in Brooklyn, for a writ of prohibition, forbidding Coroner Flavin to hold any inquest in Brooklyn as to the cause of death of Mrs. Gamble. Judge Gilbert, without hesitation, granted the writ, holding that the Coroner had no jurisdiction, for the reason that the death occurred in Rockland County. When this writ was duly served upon Coroner Flavin, Mr. Clinton thought that the persecution of his clients upon the charge of murder was at an end. But not so. A few days afterwards (on Thanksgiving Day) news was brought to him from Rockland County that the Coroner of that county had impanelled a jury and was proceeding to hold an inquest in the case. The remains of Mrs. Gamble had been disinterred from Greenwood Cemetery and taken to Piermont, Rockland County, for the purposes of the inquest. So secretly was everything managed that in the immediate vicinity the nearest neighbors did not know that the inquest was being held. It was said that even the jurors were sworn to secrecy. Mr. Clinton's informant ascertained, accidentally, that the inquest was on foot, and rushed to

New York to give him the information as quickly as possible. There seemed to be no doubt that the object was to proceed secretly, produce but little testimony—all of it on one side—secure a verdict implicating Mr. Gamble and Mrs. Hujus, so that the first they would know of the inquest would be their arrest upon the warrant of the Coroner. Their incarceration in Rockland County jail would thus be secured until the next term of the Oyer and Terminer. What was to be done? No time was to be lost if this plot was to be defeated. If it were proper to hold an inquest at all, there could be no doubt that it should be held in Rockland County, as it was there the death occurred; and it was on this ground that the writ of prohibition, forbidding the Coroner in Brooklyn, Kings County, to hold an inquest, was obtained. Undoubtedly the authors of the plot thought that they had at last cornered Mr. Clinton, and had a grip upon his clients, which would confine them behind prison bars for at least some months to come. Mr. Clinton, in studying out a way to circumvent the schemers, came to the conclusion that, irrespective of the decision of Justice Bogert and the action of the Rockland County Grand Jury, it was too late to hold an inquest anywhere. The statute provides that when a person dies suddenly the Coroner shall go where "*such person shall be.*" It is provided in another section that a jury, "*after an inspection of the body,*" and after hearing the evidence of the witnesses, shall render a verdict. The "*inspection of the body*" is one of the means by which the jury are to ascertain the cause of death. In this case the body had been cut open and mutilated at the *post-mortem*. It was necessarily much decomposed. It could not be that the law contemplated that a Coroner should hold an inquest upon a body after it had been so far mutilated and decomposed that the statute defining the duties of Coroner could not be complied with. Mr. Clinton, on

these grounds, immediately applied to Judge Gilbert for a writ of prohibition forbidding the Coroner of Rockland County from taking any further proceedings in the matter. Judge Gilbert agreed with the views of Mr. Clinton, and at once granted the writ of prohibition. Mr. Clinton feared that the Coroner would have concluded his proceedings upon the inquest and have issued his process for the arrest of the parties before the writ could be served on him. One of Mr. Clinton's clerks succeeded, however, in serving the writ in time, and reported that the Coroner said he would not obey it, and that he would proceed with the inquest. But he did not do so. Probably he was advised that it would not be prudent for him to defy the Supreme Court.

Upon the return day of both writs of prohibition above described, Mr. Clinton, for the relator, and Mr. Shaffer and Mr. Dailey, for the respondent, appeared at the Special Term of the Supreme Court in Brooklyn, held by Judge Gilbert. The respondent's Counsel filed their returns. Mr. Clinton in both cases moved for judgment absolute upon the returns, claiming that upon their face they showed no defence to the writs of prohibition. After full argument upon both sides, the Judge granted Mr. Clinton's motion, and ordered judgment absolute against the respondents. No appeal was taken, and thus ended the litigation upon these writs.

The suits which had been brought in the Supreme Court by the heirs of Mrs. Gamble, to set aside her deeds conveying certain real estate in the City of New York to her husband before she died, were to be tried. Mr. Gamble himself and Mrs. Hujus were necessarily to be the principal witnesses for the defence. They would best know whether they used any undue influence or practised any fraud to induce Mrs. Gamble to make the conveyances. The result in each case was likely to depend upon the credibility of witnesses upon the one side

and the other. Had the plan succeeded to have a Coroner's inquest held, in which presumably but little testimony would have been given, none of which would have been in favor of Gamble and Mrs. Hukus, the verdict would probably have implicated them, and would have resulted in their arrest upon the charge of murder, and their imprisonment in Rockland County jail until the next term of Oyer and Terminer. In the meanwhile the cases in the Supreme Court would have been tried. Mr. Gamble and Mrs. Hukus, being prisoners upon the charge of having feloniously, by administering poison to the grantor during her last illness, caused her death, would have been brought from prison to testify. Under such circumstances but little credence would have been given to their testimony. In fact, the case for the defence would have broken down before the trial commenced. But, instead of appearing as witnesses, stamped with disgrace, branded with crime, they stood ready to testify as respectable and upright witnesses, vindicated by a magistrate after a long examination, without introducing a word of testimony in their own behalf, and again vindicated by the Grand Jury of Rockland County after a thorough examination. There could be but little, if any, doubt that their testimony would be believed, and the result, in all human probability, would be in favor of Gamble. The zealous and persistent persecution to which they had been subjected would probably have given additional weight to their evidence. Persecution such as they had endured almost always results in favor of its victims. Mr. Clinton, having so far succeeded in the vindication of his clients, thought he had done all that was necessary for their protection, in order that their evidence should have the weight it deserved. The sequel showed that there was one method of depriving him of his testimony which, with all his caution and foresight, he had not even thought of.

The first day the cases were on the day calendar, Mr. Clinton, as he was engaged elsewhere, directed one of his clerks to attend promptly, before the Court opened, and, when the cases were called, answer "Ready," as he was desirous of trying them without unnecessary delay. The clerk happened to be a few minutes late ; and when he arrived the cases had been called, and the defaults of the defendants taken. Mr. Clinton at once took measures to have the defaults set aside, and the cases restored to their places on the calendar. Before they were again reached for trial an event, as startling as it was horrible, had occurred. While Mr. Gamble and Mrs. Hujus were in a room, near a window, at the house in Nanuet, Rockland County, some one outside fired into the room, and shot them both, killing Mrs. Hujus, and severely wounding Gamble. The interest in the civil suits subsided. The authorities of Rockland County lost no time in prosecuting the one whom they believed guilty of the murder — namely, Michael Murphy, a brother of the deceased Mrs. Gamble, and who was one of the plaintiffs in the suits to set aside the conveyances to Mr. Gamble. Murphy was tried in the Rockland County Oyer and Terminer, and convicted of the murder of Mrs. Hujus. An appeal was taken on his behalf to the Supreme Court, and the conviction was affirmed. The case was carried to the Court of Appeals, and the conviction was there affirmed. The case is reported in 63d New York Reports, page 590. Governor Tilden commuted the sentence of death to imprisonment for life ; and Murphy remained in prison until Governor Robinson pardoned him.

CHAPTER XXIV

WRIGHT V. BOOS

Suit for False Imprisonment and Malicious Prosecution.

A CURIOUS CASE AGAINST A STAGE COMPANY

A Remarkable Witness.—Peculiar Opinions of Judge Barbour.

AN EXTRAORDINARY WITNESS

A STRANGE NOTION OF ECONOMY

WRIGHT for many years was one of the principal clerks in the store of Boos, who was a furrier in the city of New York. During the latter part of this period, many articles were stolen from the store. At length suspicion fell upon Wright, in consequence of which Boos caused his arrest. He was indicted for the larceny, and, upon his trial in the New York Court of General Sessions, was acquitted. Afterwards he brought an action in the Supreme Court against Boos for false imprisonment and malicious prosecution, which was tried in April, 1871, at the Circuit presided over by Judge Josiah Sutherland. Dudley Field acted as Counsel for the plaintiff, and Mr. Clinton conducted the case on the part of the defence. Much testimony was given on both sides. In addressing the jury after the evidence was closed, Mr. Clinton contended that Mr. Boos acted in good faith; and at the time he caused the arrest and trial of plaintiff on the criminal charge, had ample grounds for believing him guilty. Mr. Clinton urged

that the case at the utmost called for only nominal damages. Mr. Field, on the other hand, in his appeal to the jury, maintained that the case was one of great aggravation; that the arrest, imprisonment, and trial were caused by the defendant without even any sufficient grounds of suspicion. He called upon the jury to render a large verdict for plaintiff. After Judge Sutherland had delivered his charge, the jury retired, and soon returned into Court, and rendered a verdict for plaintiff for the sum of six cents. The code permitted the Court, if it thought justice required it, to grant an allowance to the successful party, not to exceed five per cent. of the amount recovered, if the plaintiff succeeded; or if the defendant succeeded, not to exceed five per cent. of the amount claimed by the plaintiff. The allowance, of course, went into the pocket of the lawyer who was successful.

When the verdict for six cents was announced, the following occurred :

Judge Sutherland (in his peculiar, hoarse, and gruff voice). "Does any one move for an allowance?"

Mr. Clinton. "I consent that my learned opponent, Mr. Field, have an allowance of five per cent. on the *entire* amount of the verdict. I think he richly deserves it."

Judge Sutherland. "Let the Clerk enter an order to that effect."

Judge Sutherland, who, at times, was quite absent-minded, did not perceive the joke until the evening newspapers contained an account of the entry of the order.

The following is a report of the case in the *New York Herald* of April 22, 1871:

"SUPREME COURT—TRIAL TERM—PART 2

"A Long Slander Suit and Six Cents Damages.—Before Judge Sutherland.

"*Wright v. Boos*.—A verdict was rendered yesterday

morning in this case, which, as will be remembered, was a suit for alleged false imprisonment and slander, the damages being laid at \$10,000. The verdict was six cents damages. And such is the end of a suit which, it was thought, was brought on good grounds, which has been in the Courts six years, which the late James T. Brady, the plaintiff being a poor man, devoted much time and services to without compensation, and which Dudley Field has done since, besides spending several hundred dollars in the suit out of his own pocket. An allowance of five per cent. was granted on the amount, giving young Field, for his time, services, and outlay, three-tenths of one cent."

Judge Sutherland was proverbial for his absent-mindedness, of which many instances occurred. Some of them were quite amusing. The officers of his Court, taking advantage of his weakness in this regard, occasionally played practical jokes upon him, which, but for his kindness of heart and genial manners, would have been perilous to them. On one occasion when the Judge was sitting at Chambers one of his officers said to the others that he could get Judge Sutherland to sign any order he wanted, no matter what the order might contain. They determined to try the experiment. An order was drawn substantially as follows: "At a Special Term of the Supreme Court, held in the City Hall, in the City of New York, this — day of —, present, Hon. Josiah Sutherland, Supreme Court Justice. After hearing * * * * of Counsel for * * * *, no one appearing in opposition thereto, *it is ordered*, That the following officers of the Supreme Court [giving their names] appear with the said Josiah Sutherland, Justice of the Supreme Court, at one o'clock on the afternoon of this day, at Delmonico's restaurant and partake of a champagne lunch at his expense; and the said officers of said Supreme Court as aforesaid are hereby notified that if they or any of them fail to obey this or-

der they will be adjudged guilty of contempt of Court, and punished to the utmost extent of the law." This order, with others, was presented to Judge Sutherland, and, without examining the contents, he promptly signed it. When the Court took a recess the officers huddled around him, and one of them stated to him that he had an important engagement at one o'clock. The Judge said he did not know of any. The officer then showed him the order. He took the joke kindly, and said, "Well, boys, the order of the Court *must be obeyed*; no time must be lost."

So they marched over to Delmonico's and had a sumptuous lunch at the expense of Judge Sutherland.

Curious Case against a Stage Company

An Irish day-laborer brought suit in the Superior Court of the City of New York against a Stage Company of that city to recover a large amount for injuries received by him in consequence of having been run over by one of its stages, or omnibuses, as they were called. Judge Barbour presided at the trial. The plaintiff gave evidence in respect to the character and extent of his injuries. He testified that his ribs were broken, and that his right arm was so injured that he had never since been able to use it or to raise it even to the smallest extent. He stated that after he had received these injuries he was laid up for a long time; that it was several months before he was able to get out-of-doors. Mr. Clinton, who acted as Counsel for the Stage Company, treated the witness on cross-examination very tenderly. In a sympathetic manner he asked him in regard to additional details of his very severe injuries. In describing them the witness was very outspoken and earnest. The sufferings he underwent were excruciatingly painful, especially in the right arm, which was entirely disabled. Mr. Clinton, raising his own right arm a little,

probably in a manner which seemed to imply that he had entire confidence in the witness's frankness, asked him if he could raise his right arm that much. The witness answered "No." Mr. Clinton continued his cross-examination in this way, asking him if he could raise his right arm as much as he (Mr. Clinton) did his. The witness continued to answer in the negative. He asked him as to his (the witness's) left arm. That was all right. The witness, to illustrate, raised his left arm a little, and said he could not raise his right arm as much as that. Mr. Clinton induced the witness to raise his left arm higher, and then asked if he could not raise his right arm as much as that. The witness very emphatically said "No." In compliance with Mr. Clinton's request, the witness raised his left arm still higher. Mr. Clinton said to him, "Now, can't you lift your right arm as high as that?" "No," said the witness, growing more and more emphatic. Mr. Clinton then, rather suddenly, motioning towards witness's right arm, said, "Now just tell me how high you *can't* raise it." The witness, in the excitement of the moment, forgetting which arm had been disabled, raised his right arm its full length, high above his head, and said, "I can't raise it that much to save my life." "But you do raise it that high," shouted some one. The effect of this exhibition can well be imagined. It effectually disposed of the plaintiff's case.

Apart from this exhibition the plaintiff made of himself, facts appeared in his evidence showing that he had been guilty of "contributory negligence," and therefore he was not entitled, upon his own evidence, to recover any damages. Mr. Clinton moved for a non-suit on this ground, and cited a recent decision of the Court of Appeals precisely applicable to the facts proved. Judge Barbour intimated that he should deny the motion for non-suit. Mr. Clinton insisted that the decision of the Court of Appeals (the Court of last resort) which he

had cited was exactly in point. Judge Barbour admitted that it was, and said, "Mr. Clinton, I do not agree with the Court of Appeals in that decision. I deny your motion for non-suit. The case must go to the jury." After Mr. Clinton, for the defendant, and the Counsel for the plaintiff had addressed the jury, and the Judge had delivered his charge, the jury retired, and after they had been absent a considerable time returned into Court and rendered a verdict for plaintiff of fifty dollars. Eleven of the jurors were in favor of a verdict for the defendant. One juror was for the plaintiff. The jurors, after they were discharged, told Mr. Clinton that had they thought he desired it, they would have held out to the last for defendant, the result of which would have been a disagreement. They supposed Mr. Clinton's clients would rather pay fifty dollars than incur the expense of another trial. He told them he was entirely satisfied.

Judge Barbour afterwards became Chief-Justice of the Superior Court. The time at length arrived when he could no longer serve upon the Bench, for the reason that, being seventy years of age, he had reached the constitutional limit. He told Mr. Clinton that if the attention of the people were properly called to the subject, rather than lose his judicial services, he thought they would amend the Constitution and no longer put the limit of age at seventy years.

An Extraordinary Witness

Sometimes capital trials develop extraordinary incidents and strange features of character. Mr. Clinton has witnessed many such in his practice. The motives and reasons which govern witnesses in their testimony are at times interesting and unique. In a very celebrated capital trial many years since (with which Mr. Clinton was connected), the prosecution encountered difficulty in identifying the prisoner. She was charged

with murder and with robbing the house in which the murder was committed. It was claimed that she left the house and crossed from Brooklyn to New York in a ferryboat before daylight. A woman was called as a witness for the prosecution who testified that she saw the prisoner on board; that she knew her; and she seemed to think she could not be mistaken. Upon being asked on cross-examination why she was so positive as to the identity, she said she had not seen her since she (the prisoner) was a little girl about four or five years old (she was then about forty); but she identified her by her nose. She was asked if she saw the prisoner's nose. She said: "Oh no, I could not see her nose; she had on a thick veil, and, besides, it was dark. But I saw the impress the tip end of her nose made on her veil, so that I recognized it as the nose peculiar to her family." Such was the knowledge on which the witness seemed willing to swear away the life of the prisoner, who was a respectable woman, and belonged to one of the best families in the town in which she lived.

A Strange Notion of Economy

A man of liberal education, a graduate of a well-known university, in a moment of ungovernable passion killed another who had subjected him to slight inconvenience. He was indicted for murder, and was defended by Mr. Clinton. His trial resulted in conviction. He was by profession a teacher, and had been brought in contact with many of the first families in the city of New York. A large number of leading and very influential citizens signed a petition asking the Governor to pardon him, he having been sent to the state-prison, where he was doomed to remain for the rest of his life unless the Governor interfered. Mr. Clinton, out of pure pity, offered to present the petition and make the

application for pardon. He proposed to do this without any compensation for his services, and only asked that his expenses be paid, which would not have exceeded ten or fifteen dollars. He was confident of success. The prisoner was quite well off. In addition to what he had laid by from his habits of thrift and saving, during his imprisonment a little fortune had been left him by a near relative who had recently died. His most strongly marked characteristic was avarice. In answer to the request that he should pay Mr. Clinton's expenses he stated that he preferred to remain in prison; *it cost him nothing to live there*. By staying he could save all his money, whereas if set at liberty he might spend it. On the whole, he preferred to continue a guest of the State rather than incur the expense of freedom. Mr. Clinton determined not to stand in the way of the gratification of such miserly propensities. There was not the slightest tinge of insanity in the case. After the lapse of a considerable time those who had signed the petition in his favor, of their own motion and unbeknown to him, interceded with the Governor and procured his pardon. Thus was this talented, scholarly miser driven from the state-prison, and let loose upon the wide world, to his utter discomfort and dismay.

CHAPTER XXV.

CASE OF ISAAC VAN WART BUCKHOUT

Tried Three Times for the Murder of Alfred Rendall.—A Very Extraordinary Case.

SLEEPY HOLLOW has been made known to the world chiefly by the pen of the illustrious author, Washington Irving, as the scene of one of his most humorous and quaint legends. Although first published over seventy years ago, the interest in the adventures of the school-master, Ichabod Crane, is as fresh as ever. His personality, described as follows, could not fail to excite the deepest interest :

“The cognomen of Crane was not inapplicable to his person. He was tall, but exceedingly lank, with narrow shoulders, long arms and legs, hands that dangled a mile out of his sleeves, feet that might have served for shovels, and his whole frame most loosely hung together. His head was small and flat at top, with huge ears, large green, glassy eyes, and a long snipe nose, so that it looked like a weather-cock perched upon his spindle neck, to tell which way the wind blew. To see him striding along the profile of a hill on a windy day, with his clothes bagging and fluttering about him, one might have mistaken him for the genius of famine descending upon the earth, or some scarecrow eloped from a cornfield.”

His devotion to Miss Van Tassel excites admiration and wonder. She is described in the legend as follows :

“He [Ichabod Crane] would have passed a pleasant life

of it, in despite of the devil and all his works, if his path had not been crossed by a being that causes more perplexity to mortal man than ghosts, goblins, and the whole race of witches put together ; and that was—a woman.

“ Among the musical disciples who assembled, one evening in each week, to receive his instructions in psalmody, was Katrina Van Tassel, the daughter and only child of a substantial Dutch farmer. She was a blooming lass of fresh eighteen, plump as a partridge, ripe and melting and rosy-cheeked as one of her father’s peaches, and universally famed, not merely for her beauty, but for her vast expectations. She was withal a little of a coquette, as might be perceived even in her dress, which was a mixture of ancient and modern fashions, as most suited to set off her charms. She wore the ornaments of pure yellow gold which her great-great-grandmother had brought over from Saardam; the tempting stomacher of the olden time, and withal a provokingly short petticoat, to display the prettiest foot and ankle in the country round.”

All lovers of humorous literature who begin to read the legend cannot fail to follow to the end with unflagging interest the fortunes of hero and heroine.

In 1870, on the 1st of January—a day from time immemorial, in the State of New York, consecrated to social festivities—this same Sleepy Hollow was the scene of a terrible tragedy. Hereafter it will ever be associated with the name of Buckhout, as well as that of Irving. Isaac Van Wart Buckhout and Alfred Rendall, with their families, resided in Sleepy Hollow. Buckhout was a man of leisure. The wealth of his wife was sufficient to enable him to live in accordance with his tastes without the necessity of engaging in business. He belonged to one of the most respectable families in Westchester County. Rendall was a man of excellent repute, and carried on the business of a wine merchant in the City of New York. For several years Buckhout

and Rendall were near neighbors. They and their families were on terms of social intimacy—social visits between them were frequent.

On Christmas, 1869, Buckhout and his wife spent the day and evening with Mr. Rendall and his family. While there, Buckhout asked Mr. Rendall and his son Charles to be sure to call on him and his wife on New Year's Day. He repeated the invitation several times, and obtained from them a promise that they would call. Accordingly, on January 1, 1870, Alfred Rendall and his son called on Mr. and Mrs. Buckhout, both of whom greeted them cordially. Buckhout treated his guests to cider. He filled two glasses for them, but he did not have a third glass for himself. Buckhout's wife being present entertaining their guests, he quietly slipped into the bedroom adjoining, behind the door of which he had secreted a loaded gun. When the two guests had raised their glasses to their lips, and were in the act of drinking, Buckhout, standing in the door of the bedroom, aimed his gun at the head of the younger Rendall (Charles) and fired. Charles fell to the floor and remained some time entirely insensible. Instantly Buckhout fired at the elder Rendall, who dropped dead; upon which he jumped into the room, and, with the butt of his gun, killed his wife. Having, as he believed, killed the three, with apparent excitement—his hair flying and his dress disordered—he rushed into the street and said he had killed Charlie Rendall. He was at once arrested, after which indictments for the murder of his wife and Mr. Rendall were found against him by the Grand Jury of Westchester County. In the latter part of March, 1870, his trial for the murder of Alfred Rendall was brought on in the village of White Plains, in the Court of Oyer and Terminer for the County of Westchester, New York. He was defended by Grenville T. Jenks, of Brooklyn, Kings County, William H. Robertson,

Stephen S. Marshall, and J. S. Millard, of Westchester County. Mr. Clinton was retained for the prosecution, but his engagements in New York were such that he was not able to attend until the evidence for the prosecution had closed. However, he was in season to cross-examine the principal witnesses for the defence. The prosecution up to that time had been conducted by Hon. Jackson O. Dyckman, District Attorney of Westchester County (who afterwards, for about twenty years, served as a Judge of the Supreme Court), and John S. Bates, ex-District Attorney of Westchester County. Mr. Dyckman had caused to be subpoenaed a number of physicians as medical experts, who attended and heard all the evidence. It was expected that before the case closed they would be called and examined as witnesses on behalf of the prosecution, and state their opinions in answer to hypothetical questions (intended to embody the facts proved on the trial), whether a case of insanity on the part of the prisoner had been shown. On behalf of the defence, among the medical witnesses called were Dr. Brown, at the head of the Bloomingdale Asylum, in New York City, and Dr. George C. S. Choate (a brother of Joseph H. Choate, the distinguished New York lawyer), who had been for seventeen years superintendent of the State Lunatic Asylum in Massachusetts. The drift of their direct examination was to the effect that the prisoner was insane, provided the facts contained in the hypothetical question put to them were therein correctly stated. Mr. Clinton elicited on their cross-examination sufficient to sustain the prosecution, in case the facts which he claimed to exist were established by the evidence. Yet he expected to rely mainly upon the expert medical evidence to be introduced at the end of the trial by the prosecution. During the progress of the trial he several times asked the medical witnesses for the prosecution what they thought of the evidence—whether it

showed sanity or insanity on the part of the prisoner. He could get no definite answer from them, they stating that they desired to hear the whole evidence before giving any opinion. After the case for the prisoner was rested, and the prosecution had introduced what rebutting testimony they had other than medical, it being about the usual time for supper, the Court adjourned one hour for that purpose. Mr. Clinton and Mr. Dyckman spent that hour at the office of the latter with the medical witnesses for the prosecution. Mr. Clinton attempted to get from them an opinion in which they could all concur as to whether the entire evidence in the case, all of which they had heard, showed that the prisoner was sane, so that he could formulate a hypothetical question containing the chief features of the evidence to be put to them. A stenographer was present, to whom he could dictate the question. These physicians differed among themselves. Some of them differed upon the principal points in question, and some did not seem to have any definite opinion—or, if they did, it was difficult to ascertain what that opinion was. The hour was spent in a vain endeavor by Mr. Clinton to so far bring order out of the chaos of their views as to formulate a suitable hypothetical question to be asked them on the witness stand. Finally the Court, having commenced its evening session, and sent for Mr. Clinton and Mr. Dyckman to go on with the case, Mr. Clinton said to these witnesses that they might consider themselves excused from further attendance upon the trial, and that if they desired to take the next train (which would leave very soon) they were welcome to do so. Mr. Clinton and Mr. Dyckman immediately returned to Court and announced that they should produce no further evidence, and that they rested the case for the prosecution. Mr. Jenks addressed the jury on behalf of the defence, after which they were addressed by Mr. Clinton on the part

of the prosecution. Judge Tappan delivered an able and impartial charge. The jury, after being out a long time, failed to agree and were discharged. They stood eight for conviction and four for acquittal.

The second trial of Buckhout was commenced at White Plains on the 29th of March, 1871, Judge Joseph F. Barnard presiding. The prosecution was conducted by Mr. Clinton, District Attorney Dyckman, and ex-District Attorney Bates. The same Counsel as upon the first trial conducted the defence, except that Hon. John McKeon, of New York City, took the place of Mr. Jenks, who, in the meantime, had died. Substantially the same evidence was given as upon the first trial. The theory of the prosecution was that Buckhout, in killing his wife and Alfred Rendall, and attempting to kill Charles, was actuated by motives of jealousy—that he (Buckhout), without any real cause, suspected that the Rendalls—father and son—were improperly intimate with Mrs. Buckhout. Dr. Choate and Dr. Brown were the principal medical experts who testified for the defence. Dr. John P. Gray, superintendent of the State Lunatic Asylum in Utica, New York, and Dr. A. K. Gardiner, of New York City, having been selected by Mr. Clinton, attended and testified as medical experts on the part of the prosecution. On the 6th of April (the testimony having been closed on the previous day), Mr. McKeon, on behalf of the defence, occupied between seven and eight hours in addressing the jury, after which Mr. Clinton addressed them, occupying between three and four hours. Judge Barnard made a very clear and impartial charge, after which the jury retired, it being then about ten o'clock Thursday evening. They were kept together until the Sunday following, when, having failed to agree, they were discharged. From the first they stood eleven for conviction. The other juror who would not agree with the eleven was an extraordinary

character. He had no right to be upon the jury. He got there by a curious mistake. There were two men of the same name residing in different towns in Westchester County, one of whom was summoned to attend as a juror; the other, out of curiosity, attended when the jury were being impanelled. When ten or eleven jurors had been impanelled and sworn, the name of the former (who was not in attendance) was called by the Clerk of the Court. The latter, hearing his name called, answered "Here." The jurors who had been impanelled and sworn were challenged on the ground of the formation or expression of an opinion as to the guilt or innocence of the prisoner. The juror who had just answered "Here" was challenged by the prosecution on the same ground as the others. He was at once directed by the Court to take the stand, and was sworn to answer truly all questions put to him upon the challenges interposed. After Mr. Clinton had put him a few questions, he and Mr. Dyckman concluded that they could elicit no answers from him which would sustain the challenge. His answers indicated that he was a weak man, and would not be likely to have any opinions of his own to induce him to hold out against the other jurors. It was deemed better to accept him as a juror than to challenge him peremptorily. Mr. Clinton and Mr. Dyckman thought he would be a mere cipher and would do neither any good nor harm upon the jury. He was, accordingly, sworn as a juror in the case, very soon after which the trial began. After the trial had been in progress some little time, the namesake of the juror—who was the real juror summoned—made his appearance in Court; and the Clerk was dumfounded when he discovered his mistake. He was afraid he would get into trouble if his negligence in permitting the mock juror to take the place of the real juror should be discovered. He therefore said nothing—told no one of his blunder.

When the jury retired to consider their verdict the trial had continued for over a week. During that time none of his fellow-jurors discovered anything out of the way with this mock juror. Nothing peculiar in his conduct appeared during this time. But no sooner had the jury retired Thursday evening, at the close of the charge of the Judge, than it was made clear to the other eleven jurors that the mock juror was the most eccentric character they had ever met. After a brief consultation was had a ballot was taken and the eleven all voted "Guilty"; the twelfth juror would not vote. When remonstrated with, and told that it was his duty as a juror to express his opinion as to whether the prisoner were guilty or not guilty, he was obstinate, and declined to discuss the subject. He was singularly reticent. One juror after another took him in hand and endeavored to draw him out in conversation; but they all met with poor success. When pressed hard for the reasons for his extraordinary conduct, he said he wanted to have nothing to do with the affair anyway. The other jurors tried to impress upon him that it was his duty to consider the evidence and make up his mind whether the prisoner were guilty of murder. He finally explained his views. He said, in substance, the whole thing was really a domestic affair between the prisoner and his wife; he (the juror) could not help it if the prisoner did happen to kill his wife and the man whose attentions she encouraged; he (the juror) was not going to interfere in regard to the domestic affairs of the prisoner and his wife—it would be indelicate and impertinent for him to do so; it was as much as he (the juror) could do to keep his own wife in order; he did not want to be—and he would not be—bothered about another man's wife. Finally, after the other jurors had continued their talk with him for a considerable time, he told them he was tired and thought he would go to sleep for the night; but if he should happen

to dream anything about Buckhout and his troubles he would let them know next morning. Thus, from Thursday evening until Sunday, with nothing to discuss (the eleven having been agreed from the start) but the remarkable views of this one juror, the jury were kept together. There was no other business for the Court that term after the Buckhout case was given to the jury. Judge Barnard, who resided in Poughkeepsie, remained at White Plains three days and three nights, so as to be on hand when the jury agreed and receive their verdict. On the third day (Sunday) the jury came into court and stated that they could never agree if they were kept out a month; yet Judge Barnard sent them back so as to afford them a further opportunity to agree. Later in the day they appeared again in Court and were discharged. Probably Judge Barnard had heard in some way that the obstacle to their agreement was insuperable. The course pursued by this juror necessitated a third trial of Buckhout. Generally, after two successive trials, each of which resulted in a disagreement of the jury, the further prosecution of a case is abandoned; or, at the worst, a plea of "Guilty" of some minor offence is accepted. The third trial of Buckhout was commenced in White Plains on the 6th of July, 1871, Judge Joseph F. Barnard presiding. The same Counsel for the prosecution and the defence appeared as upon the second trial, with the exception of Mr. McKeon. The testimony on both sides was substantially the same as upon the second trial. On the 18th of July, the testimony on both sides having been closed, addresses to the jury were made by Counsel for the prisoner and by Mr. Clinton on the part of the prosecution, after which Judge Barnard delivered a clear and impartial charge. The jury retired, and, after a somewhat prolonged absence, returned into Court and rendered a verdict of guilty of murder in the first degree, and the prisoner was subsequently executed.

The extraordinary manner in which Buckhout killed his wife and Alfred Rendall, and came near killing Charles Rendall, suggested at once the theory of insanity. It seemed *prima facie* evident that a man who would thus act must be insane. Yet, upon a most thorough examination, and upon a full consideration of all the facts and circumstances, Mr. Clinton had no doubt that Buckhout was entirely sane, and legally as well as morally accountable for his act. Some time previous to the homicide Buckhout and his wife, upon the recommendation of the Rendalls, had taken a friend of theirs—a young man named Maillard—to board with them. Buckhout was not given to habits of industry, but spent his time in hunting and fishing and in idleness. At times he drank to excess. He was more or less morose, and easily gave way to jealousy of his wife. Without sufficient cause he became jealous of Maillard. As he brooded over the matter, he fancied that the Rendalls—father and son—were in some way connected with Maillard's intimacy with Mrs. Buckhout. He brooded over the subject until he deliberately made up his mind to kill them and his wife. Mr. Clinton expressed these views in his address to the jury. After Buckhout was convicted, and his Counsel had exhausted all their efforts without success to obtain a new trial or commutation of sentence of death to imprisonment for life, and he had given up all hope of escaping the gallows, Dr. Gray asked him why he killed his wife and Alfred Rendall, and nearly killed his son, Charles Rendall. Buckhout stated his motive, and his process of reasoning which led him to believe that the Rendalls were in some way connected with the supposed infidelity of Mrs. Buckhout, which were identically the same as were imputed to him by Mr. Clinton in his address to the jury.

Although Mr. Clinton, during the first twenty years of his practice, as near as he can tell, defended about

one hundred murder cases and succeeded in them all—where he did not secure acquittals, he saved the lives of his clients—this was the first and only capital case which he conducted on behalf of the prosecution. He was exceedingly anxious that no injustice should be done. Had he discovered any reason to believe that Buckhout was insane, he would have exerted himself to the utmost to prevent his execution. There can be no doubt that the murder of Alfred Rendall was the wanton and deliberate act of a sane man, and that Buckhout deserved his fate.

CHAPTER XXVI

WRITS OF PROHIBITION AGAINST MAYOR A. OAKLEY HALL AND AGAINST THE ALDERMEN AND ASSISTANT ALDERMEN OF THE CITY OF NEW YORK

The Result of the Schemes of Aldermen and Assistant Aldermen (Elected the Previous Year) to Hold Over.—Exciting and Extraordinary Scenes in Serving the Writs of Prohibition.

IN October, 1871, the Apollo Hall Reform Democracy of the city of New York nominated the following ticket:

For Judge of the Supreme Court, George C. Barrett.

For Judges of the Superior Court, William E. Curtis and John Sedgwick.

For Judge of the Court of Common Pleas, Charles P. Daly.

For Register, Franz Sigel.

These nominations of Apollo Hall were indorsed by the Republicans and by the Committee of Seventy. The terms of Aldermen and Assistant Aldermen elected during the previous year (1870) were extended by an act of the Legislature of 1871 for one year from the expiration of the terms for which they were elected. Mr. Clinton advised the Apollo Hall organization (of which he was a very active member) that this law was unconstitutional; and upon his advice that organization put in nomination candidates for Aldermen and Assistant Aldermen, which nominations were indorsed by the Republicans and the Committee of Seventy. Afterwards the Tammany Hall organization (although they

had not previously intended to do so) nominated candidates for Aldermen and Assistant Aldermen. The candidates of Apollo Hall for Judges, Register, Aldermen, and Assistant Aldermen were elected by large majorities. It was the determination of Tammany Hall that the Aldermen and Assistant Aldermen elected on the Reform ticket should never obtain certificates of election, and that the votes for them should not be counted. When the Board of Supervisors met to canvass the votes it was necessary for Mr. Clinton and A. R. Lawrence, Jr. (now and for twenty years past a Judge of the Supreme Court), who acted as Counsel for the Reform organization, to obtain a *mandamus* from a Judge of the Supreme Court, to compel that Board to count the votes for those elected on the Reform ticket as Aldermen and Assistant Aldermen. It was well known that it was the determination of those whose terms had been extended by the Legislature to "hold over," and not permit the persons elected on the Democratic Reform ticket ever to enter upon the discharge of their duties. The would-be "hold-overs" thought that as they were in office they could not be dislodged. They and their advisers proceeded upon the idea that all the newly elected Aldermen and Assistant Aldermen could do would be to induce the Attorney-General on their behalf to proceed by *quo warranto* to try the title to the office, and, if successful, obtain judgment ousting the "hold-overs." When such judgment was obtained appeal after appeal might follow; so that quite likely a final decision in the Court of Appeals would not be had in less than two or three years. In the meantime the terms of the Reform Aldermen and the "hold-overs" would have expired. The only practical effect of a decision would be to determine who were entitled to be paid their official salaries. It devolved upon Mr. Clinton to devise, if he could, some plan by which the scheme

of the Tammany Aldermen and Assistant Aldermen, then in office, to hold over could be thwarted. He formed the plan of obtaining a writ of prohibition forbidding the Mayor to appoint any of the Aldermen or Assistant Aldermen then in office for the term beginning on the 1st of January, 1872, or to recognize them, or any of them, after the 1st of January, 1872, or to recognize any but those who were elected on the 7th of November, 1871. His plan was also to obtain writs of prohibition, forbidding the Aldermen and Assistant Aldermen, and each and every of them, then in office, to receive any appointment from the Mayor for the term beginning the 1st of January, 1872, or to act as Aldermen or Assistant Aldermen after that time. Mr. Clinton having prepared these writs of prohibition and petitions which were properly verified, applied to Judge Brady, of the Supreme Court, who, on the 29th of December, 1871, allowed the writs.

Mr. Clinton had no doubt that as soon as the would-be "hold-overs" knew what steps he had taken they would devise some plan to nullify the writs by having them set aside, or would concoct some scheme to prevent the writs having their desired effect.

On Saturday afternoon, the 30th of December, at Mr. Clinton's request, E. B. Shafer, Esq., served the writ of prohibition on Mayor Hall. The first plan of the would-be "hold-overs" was to get the writ set aside by some Judge other than Judge Brady. This was attempted and failed. Then another scheme—which showed originality and boldness—was concocted. There was a provision of law to the effect that if any vacancies occurred in the Board of Aldermen, such vacancies could be filled by appointment by the Mayor. The plan was formed that the Board of Aldermen and Assistant Aldermen should meet early Monday morning (the 1st of January) and impeach Mayor Hall, so that

Thomas Coman, President of the Board of Aldermen, would become acting Mayor. The plan was, at twelve o'clock, noon, on that day (when the terms of the newly elected Aldermen would begin), to adjourn the old Board, when all the members of that Board would resign, thereby creating vacancies; and then acting Mayor Coman would fill these vacancies by appointing the Aldermen who had just resigned. The scheme proceeded upon the idea that Mr. Clinton, in his plan for having the newly elected Aldermen inducted into office at the commencement of their terms, relied entirely upon the writ of prohibition against Mayor Hall. Mr. Clinton had no disposition to prematurely undeceive them. He determined to delay the service of the writs of prohibition against the Aldermen, so that the interval between their service and the commencement of the term of the newly elected Aldermen should be as short as possible. To get ready the papers to be served was no easy task. It was necessary that a complete set of papers should be served on each Alderman and Assistant Alderman who might attempt to hold over. Each set of papers made probably about thirty or forty pages of ordinary writing, and consisted of copies of the petition, the order for the issuing of the writ, and the writ of prohibition itself. Mr. Clinton was unwilling to print the papers, or to employ extra copyists, lest the secret that he had the writs of prohibition might leak out. Those were troublous and desperate times. The Tweed-Tammany Ring would not have scrupled to resort to any means to keep their Aldermen in power. Mr. Clinton was so careful to keep his plans secret that he did not explain them to his clients—the newly elected Aldermen and Assistant Aldermen. He stipulated with them that they should ask him nothing about his plans. All he asked of them was to follow his instructions, which they cheerfully agreed to do. The only way Mr. Clin-

ton could get the necessary copies of papers ready to serve was to keep his office closed, and require his whole clerical force to leave everything else and devote day and night to the business until it was completed. With the aid of a goodly number of copy-presses they succeeded. In order to have one set of papers for each Alderman and Assistant Alderman, it was necessary to have about forty sets of papers. On Monday morning early (1st of January, 1872), the newly elected Aldermen were, in pursuance of Mr. Clinton's directions, at the City Hall, and remained in the Governor's room awaiting his instructions. He (with his clerks) and Mr. Lawrence were on hand about nine o'clock. The excitement was intense. Immense crowds thronged the City Hall. The Boards of Aldermen and Assistant Aldermen assembled very early that morning, and proceeded to put in execution their plan to impeach the Mayor.

The members of the old Board of Aldermen were prepared to put in their resignations just before twelve o'clock, when their terms would expire. Mr. Coman was prepared to appoint them to the vacancies occasioned by their resignations. Their appointments were made out in writing beforehand, ready for him to sign. These Aldermen and their advisers undoubtedly thought that their cunningly devised scheme would work to perfection, so as to continue them in office to the exclusion of the newly elected Aldermen. About eleven o'clock one of the Aldermen came out of the Aldermanic room, and, in pursuance of Mr. Clinton's directions, one of his clerks served him with a writ of prohibition. He immediately returned, upon which the doors of the room where the Aldermen were convened were shut and securely fastened. No ingress nor egress was permitted. Before twelve o'clock there was no other opportunity to serve any of the Aldermen with the writs. The Board of

Assistant Aldermen did not close their doors. At Mr. Clinton's request, Mr. Lawrence attended that Board in order to serve the writs. While the public were admitted to the room, Mr. Lawrence was not allowed to go inside the railing.

The following account of the proceedings is given in the *New York World* of January 2, 1872:

"THE DEFIANT ASSISTANTS

"At the meeting of the Board of Assistant Aldermen, in the chamber on the opposite side of the hall, the excitement was still more alarming. The members were all seated at their desks in two semicircles, and the president was seated on the high bench before them. The seats at the rear of the room were crowded with spectators, but not one of them was allowed to go inside the iron railing which separates the chamber. The gate was guarded by three men, and others were placed at short intervals across the room in front of the rail, to prevent any one from jumping over. There were two or three lawyers' clerks among the spectators, watching with lynx eyes for an opportunity to serve the writs on the members before the clock struck twelve. The Aldermen were aware of their presence; and not feeling authorized to forcibly eject them, they could only guard against the injunction by keeping themselves well inside the iron partition, and the clerks with the writs were without. Occasionally one of the Aldermen would signal to the head guardsmen to be on the alert; and finally, to increase their force, several policemen were called in and placed before the rail, first receiving positive orders to allow no one to pass under any pretence whatever. A few persons, who had been accustomed to attend the meetings, were dumfounded when they were met with such abrupt treatment at the gate, and, though they protested loud and long, they reasoned in vain. The meeting was called to order by several sharp raps of the president's gavel. The machine was at once started, and run under high pressure. The president assumed an air of

defiance in everything, and when he called up an Alderman for 'miscellaneous communications,' or announced a 'general order,' and said the 'reader would read,' he seemed to add, mentally, 'Who can do this better than I can?' All the time the Board was in session the crowd of outsiders kept pouring in, and the private door, which was kept locked, was constantly besieged. Only a few reporters of the Press were admitted beyond the rail, and they were only trusted on account of being so well known. The sergeant-at-arms said he would not admit anybody else, no matter if they came from the 'Herald of Heaven.' Some matters of minor importance having been disposed of—such as allowing certain parties to erect lamps before their doors, and giving to others the privilege of taking up their sidewalk—and the hour of twelve having nearly arrived, when the old Board would go out of office, an Alderman arose and moved that when the Board of Assistant Aldermen for 1871 adjourn, they adjourn *sine die*. The minute-hand of the clock was at eleven and the hour-hand was nearing the point of twelve. Three minutes were allowed to pass, and then the president got up to make his farewell speech. As soon as he began to speak, thanking the members for their kind support during the past year, etc., an Alderman said: 'It isn't twelve o'clock yet; why don't you wait a few minutes?' 'Well,' replied the president, 'that clock's about two minutes slow.' And he resumed his valedictory, the remainder of which was rather incoherent, partly owing to the interruption and partly on account of the delicate business which was expected to ensue. Having finished his speech, the president descended from his high position, relinquishing his authority as presiding officer of the Board. Many people then got up and started out of the room, when, on a sudden, the Board of Assistant Aldermen for the year 1872—which, according to their way of thinking, was the same as last year, member for member—was called to order.

"Mr. Maloney, the clerk, began to read something which was necessary in organizing the new Board, when a tall man popped up among the spectators outside the rail and began

to address the meeting. He was instantly recognized as Mr. A. R. Lawrence, one of the Counsel to the new Board, and the man who was known to hold some of the writs of prohibition. His voice was immediately drowned in the angry storm that followed, and the clerk rapped violently on the top of his desk with his wooden gavel. Mr. Lawrence was still for a moment, but as soon as the clerk ceased to rap he began again. The clerk resorted to his gavel a second time, and the Aldermen began to 'chuck' epithets at the speaker. Mr. Lawrence proceeded, nevertheless, in a firm, regular tone. It sounded like a magistrate reading the riot act to a seditious mob. The clerk continued to rap for some time, at the same time shouting something about the tenth section of the charter, which was quoted as his authority for this action. The lawyer was too persistent, however, and the Aldermen were forced to hear his protest in spite of their efforts to silence him. Mr. Lawrence grew a little pale in the face, for he did not know how soon an inkstand might be hurled at his head. People sitting near him began to vacate their places, lest the missile, should it come, might damage them also. After repeating the protest several times, and orally serving the writ of the Supreme Court on all of them at once, assuring them that if they proceeded to organize themselves into a new Board they did so at their peril, he got down and walked out. The Aldermen remained for some time, apparently undecided as to what they would do, and they soon after broke up and left the chamber."

It was not so easy to make service of the writs upon the Aldermen. When the hour of twelve had nearly arrived, Mr. Clinton and his clerks gathered about the doors of the room of the Board of Aldermen, which were securely locked and guarded. Until twelve o'clock arrived the newly elected Aldermen had no right to take possession. Just before—probably about three minutes before—twelve, a small-sized young man emerged from the private door, which was opened but a little way to

let him out. Mr. Clinton instantly placed his shoulder against the door and held it open. The sergeant-at-arms (who was a rather stout, muscular man) attempted in vain to dislodge him. Just at this time the President of the Board of Aldermen was endeavoring to adjourn the old Board and organize the new one for 1872. Although the door was open, there was a screen in front of the doorway, so that those in the room could not see Mr. Clinton. He, holding the door open by main force, in a very loud tone of voice, in the name of the Supreme Court, commanded the Aldermen to disperse; he proclaimed the substance of the writ, and told the Aldermen that if they continued in session or acted as Aldermen after twelve o'clock they would all be arrested and sent to prison for contempt of Court. During this time the Aldermen made desperate efforts to proceed with business. Mr. Clinton's voice was so loud as to drown their voices. He could hear them shouting to the sergeant-at-arms, directing him to close the door. He heard frequent expressions like this: "Why the hell don't you shut the door?" The sergeant-at-arms was doing his best "to shut the door." Mr. Clinton found but little difficulty in holding it open. In the meantime, the representative of the Commissioner of Public Works arrived with an order that the room be surrendered to the newly elected Aldermen. In the name of that official Mr. Clinton demanded possession of the room. As soon as he was sure that it was twelve o'clock he sent word to the Aldermen-elect (who were still in the Governor's room awaiting his instructions) that he was ready for them. When they arrived, Mr. Clinton said to them: "Follow me," and, pushing aside the sergeant-at-arms, he burst into the room, followed by the newly elected Aldermen and his clerks, and a large crowd surged in after them. Then followed scenes which were never before, and which have never

been since, witnessed in a legislative body. Mr. Clinton's clerks sprang for the Aldermen, in order to serve them with copies of the writ and accompanying papers; they, in order to avoid service, leaped from their seats, rushed around the room, knocking over chairs, desks, and tables, the clerks in hot pursuit and managing to serve the papers by throwing copies in their faces or inside the collars of their coats and vests. While these proceedings were in progress, the newly elected Aldermen, following Mr. Clinton, rushed inside the railing and occupied the seats which had just been vacated. The new Board instantly organized, and elected S. B. H. Vance temporary chairman and E. B. Shafer clerk *pro tem*. *Thus, within about ten minutes from the time their terms commenced, the Aldermen elected on the Democratic Reform ticket were installed in office and the would-be "hold-overs" were ousted.* Mr. Clinton's plan succeeded perfectly. By keeping the old Aldermen ignorant of the fact of the existence of the writ of prohibition against them until within about one hour of the expiration of their terms of office, he was quite sure that they could not within that hour concoct any successful scheme to defeat the object of the writ. Their only idea was to avoid service. Hence they shut themselves up, and when the process-servers were upon them they could think of nothing but to run; and by so doing they yielded up their offices. Their legal position was that of *outsiders*—they were mere *claimants*—the Reform Aldermen were *in possession*. If the old Aldermen desired to serve as Aldermen for the year 1872 their only remedy was to have proceedings by *quo warranto* instituted; and, of course, it would take until long after their terms had ended to conduct such proceedings to final judgment. On Saturday, two days before they were ousted, they were eager to bet a thousand dollars to fifty dollars that they would continue to act as Al-

dermen, and that those who were elected on the Reform ticket would not be installed in office. But now their courage was all gone; they gave up the fight and surrendered unconditionally.

The following extracts from some of the leading New York daily papers of January 2, 1872, in respect to the manner in which the Reform Aldermen obtained possession of the Aldermanic room, may not be uninteresting.

The New York *World* of January 2, 1872, in the course of its account of the proceedings, says:

"It was twelve o'clock and a few minutes after. The new Board of Aldermen were drawn up in line, with Mr. Clinton at the head. They stood at the door of the chamber of the Board of Aldermen waiting for their chance. Just as the old Board were about to reorganize into a new one the door was opened to let some one out, and instantly it was seized by Mr. Clinton and two or three of his clerks. Mr. Munn, the sturdy sergeant-at-arms, endeavored to pull it to again, but the attacking party was too strong.

"Mr. Clinton stuck his head inside and shouted out, saying: 'I have a writ of prohibition from the Supreme Court forbidding this Board from holding office after twelve o'clock to-day.' Then additional force was applied to the door from within.

"'Resist me if you dare,' roared the undaunted Counsellor, and again he put his head past the sergeant-at-arms and repeated: 'We are here to demand admission as the duly elected Board of Aldermen for the year 1872. I have writs of prohibition restraining you from holding office after twelve o'clock this day.'

"There was great excitement among the Aldermen inside. They told the door-keepers to keep out all intruders, but did not offer any resistance themselves. Surely 'the hour and the man had arrived.'

"At the side of Mr. Clinton stood Mr. George Roome, the keeper of the City Hall, with an order from the Com-

missioner of Public Works directing him to clear the chamber of the Board of Aldermen for the newly elected members.

"Mr. Clinton then shouted again, saying: 'I have an order on behalf of the Commissioner of Public Works to clear this room. Your time is up. You must adjourn and vacate the room.' He had employed a stenographer to accompany him and put down everything he said in demanding admission and everything said by the other side in refusing it.

"Referring to the sergeant-at-arms, he said: 'Do you hear what this man says? Mr. Young, put down everything we say. He says he does not care for the writ of the Supreme Court.' Mr. Clinton then attempted to get data for a case against the sergeant-at-arms.

"'Who are you?' he demanded.

"No answer, but the sergeant-at-arms continued to tug at the door, which was held firmly open by Mr. Clinton's colleagues.

"'Who are you, I say? Are you an Alderman?'

"'No.'

"'Are you sergeant-at-arms?'

"No answer was given.

"'Well, what is your name? What is your name, I say? I demand your name!'

"Just then a friend of the sergeant-at-arms came up, and, looking over the heads of the combatants, called out the door-keeper's name.

"'Ah, your name is Munn, is it? Mr. Young, put that down. I'll make you regret your action to-day, sir, of resisting the Supreme Court.'

"'Well, I can't help it. You can't blame me in working for my friends,' replied the sergeant-at-arms, getting frightened.

"After struggling at the door about five minutes the men guarding it began to waver, and by a combined charge, each man standing behind the other and pushing at his back, Mr. Clinton broke past the guard and burst in upon

the startled inmates of the room, followed by the full new Board of Aldermen. The sergeant-at-arms shot out his leg as each man passed, but the tide was so strong that he was carried off his feet. Mr. Clinton's ubiquitous clerks were in the room almost as quickly as anybody, and immediately they began to distribute the writs. Some of the old Aldermen, in order to avoid them, made a rush for the door. But Mr. Clinton called out to his clerks to follow them, crying, 'Serve them! Serve them!' A few of the bravest of the old Aldermen resolved to fight it out to the last, and had intrenched themselves behind the president's desk. As the head of the attacking party came in those men shouted, 'Put them out! Put them out, I tell you!' But they soon came in such strong numbers that all hope of resisting by force was abandoned.

"Then a disturbance occurred in the centre of the room—one of Mr. Clinton's clerks, a boy named Shields, having accused Alderman James Irving with striking him when he attempted to serve him with the writ. Mr. Clinton, hearing the discussion, walked up and said, 'What's that? Did he strike you? Can you swear to that? Are you not mistaken?' And then, turning to Irving, who stood like a huge, coarse giant, his eyes flashing as sharp as the rays from the big diamond on his shirt-front, his hands in his overcoat pockets, and a cigar in his mouth, he continued: 'You didn't strike that boy, did you? I thought you wouldn't do such a thing as that. I know you too well to believe that you would strike a boy!'

"'Why, good God! I ain't had my hands out of my pockets! What is the fellow talking about?'

"This settled the matter for the moment; but soon the young clerk was fronting Irving again, looking defiantly up into his face and putting the charge to him point-blank.

"'What do you say? What do you say?' said the Alderman, bending over the young twig, who was a mere baby beside his antagonist. 'Do you say I struck you?'

"'Yes, sir; I do say so. You struck me, big as you are.'

"'You're a G—d—liar!' quoth the city father; and

the boy concluded not to carry the argument any further. Irving sailed out of the room, and the boy turned the other way, declaring he would procure a warrant and have the ex-Alderman arrested for assault and battery.

"The old Aldermen had soon all left the room, only a few of the old clerks remaining. Mr. Hardy, the clerk of the old Board, was the last to desert the much-loved scenes.

"General Cochrane then stood up, and, with much pride, he asked the new Board of Aldermen to come to order."

The New York *Herald* of January 2, 1872, in describing the manner in which possession of the Aldermanic room was obtained, says :

"The Board was then called to order by President Coman. Mr. John Hardy, the clerk, read a document relating to public works, nervously looking at the clock every moment. Resolutions relating thereto were hurriedly passed. When the hands of the clock reached twelve, President Coman left the chair, and Alderman Woltman took his place. The roll was again called. Before, however, the last name was reached there were rumbling sounds of a commotion in the lobby. The sounds grew louder; then commenced an angry altercation with the sergeant-at-arms from the outside people. The president struck his 'gavel' on the desk again and again, and ordered the sergeant-at-arms to close the door. The noise grew louder and louder. It at length so overcame all the voices inside that two or three of the members left their chairs. One of the first to go to the door was Alderman Irving. He started as though he meant mischief. He got to the door, but cooler heads, who knew something about his fists, took him back. By this time Mr. George Roome had obtained admission to the room, but did no more than inform several of the members who were the disturbers of their peace. The reporters left in a body to see the fun, and there was the sergeant-at-arms blocking up the little side door with his heavy body, refusing admission to Mr. Clinton and Mr. Shafer, Captain Thorne, and a number of citizens.

Mr. Clinton was shouting out a legal document quite within the hearing of every one of the members inside, and a stenographer behind Mr. Clinton was taking down the refusals of the sergeant-at-arms when Mr. Clinton demanded admission into the room. Alderman Woltman was heard to declare that the Board stood adjourned, subject to the call of the chair, and just at that moment a rush was made and the sergeant-at-arms gave up the struggle. Citizens, police, Aldermen came rushing in pell-mell, and then followed a scene that will never be forgotten by those who saw it.

"Among the excited throng who had just entered was the clerk who was charged with the service of the writs on the Aldermen. He was a small, wiry, energetic young man. In a moment, to the astonishment of those who knew who he was, he was serving on the retreating and evidently frightened Aldermen the ominous documents. He offered Alderman Irving one. The Alderman, true to his nature, struck the boy. Two reporters stepped between them and restrained the Alderman. He threw the writ away, and he ran off to the president's chair, as though he thought that sacred place would save him from arrest. The limb of the law pursued him there and gave him the writ, which he indignantly took. Some of the 'bullies' of the Board shouted, 'Turn him out!' and a tall, black-mustached messenger of the Court caught the young man as he was crossing the chamber to serve some fleeing Aldermen. The messenger struck him, and lifted him up, evidently with the intention of throwing him over the railing. A reporter went up to this pugilistic individual and advised him not to do that, for he was assaulting a messenger of the Supreme Court. The man had sense enough to disobey the orders of his superiors, and he let go his hold of the process-server. The moment he was rescued he 'went' for the Aldermen who had stayed without the inclosure to watch the fight, and succeeded in serving every member of the Board with a writ. By this time the police had arrived, and they formed in line behind the Aldermanic chairs, and order was at once secured, and the new Board proceeded to organize."

The following is an extract from the report of the proceedings in the New York *Sun* of January 2, 1872:

"Meanwhile the Reform Aldermen had assembled in the Governor's room, and Mr. H. L. Clinton, legal Counsel of the new Board, made his appearance. A great crowd gathered around him. 'I have writs of the Supreme Court,' he told the *Sun* reporter, 'prohibiting the Aldermen and Assistant Aldermen from even sitting after twelve o'clock as Aldermen. They are trying to evade the service; but I will get at them.'

"Mr. Clinton sent his clerk, Mr. Andrew Shields, to serve the writs on the Aldermen, who were locked up in their chamber, discussing the means by which they could continue in office for another year. The young man was denied admission; but finally he slipped in, and, seeing Alderman Mitchell at his desk, wanted to go inside the railing to give him the writ. He was not allowed, however, to go inside the railing, so he threw the document on the desk, saying, 'Alderman, here's a writ of the Supreme Court for you; here's the original.'

"Alderman Mitchell pretended that he had not heard a word, and let the paper drop on the floor. 'It's all the same,' hallooed the young man at the top of his shrill voice; 'you have notice that the writ is served upon you.' He tried to serve the writs upon the others, but they stood in the other corner of the room. He attempted to approach them, but it was idle; he was not allowed to go inside the railing, and finally, in good order, beat a retreat.

"Mr. Clinton meanwhile had kept quiet. 'We'll fetch them as soon as it is twelve o'clock,' he said to the *Sun* reporter. At half-past ten the reporters applied for admission, but the door-keeper, when he saw them, slammed the door in their faces and said he would admit nobody. The excitement became greater and greater, until the hall was completely blocked up. The doors were not opened until a quarter of twelve o'clock. Then the reporters were admitted.

"The minutes of the last meeting—the meeting had just been held—were read by the clerk.

"*Alderman Woltman*. 'I move now that the Board of Aldermen for the year 1871 adjourn *sine die*.'

"Here a great uproar was heard at the door. The voice of Mr. Clinton was heard in stentorian tones demanding admission. 'Shut the door!' 'Pitch them out!' the Aldermen cried. James Irving, the valiant, went to the door. 'Hold on, Jim,' said Alderman Plunkitt, 'don't get yourself into trouble.'

"There was a fight between the door-keeper and Mr. Clinton. Mr. Clinton was the stronger of the two, and after a severe struggle the door was burst open. All the officers of the Common Council rallied round the door-keeper. They tried to shut the door, but they couldn't. Mr. Clinton and some of his followers, evidently determined to use force, held the door open, and after a severe struggle the door-keeper and his assistants abandoned all hope of shutting the door. The crowd eagerly peered in while Mr. Clinton shouted, in a voice which was heard by every one of the Aldermen: 'I demand admission to this room on behalf of the Board of Aldermen elected for the year 1872.'

"'Shut the door!' cried James Irving, going near the door and uttering half a dozen oaths.

"*Alderman Coman*. 'Gentlemen, you have heard the motion of Alderman Woltman. What is your pleasure?'

"The door-keeper again tried to push Mr. Clinton out, but couldn't.

"*Mr. Clinton* (shouting). 'A writ of prohibition issuing out of the Supreme Court, forbidding any Alderman not elected at the recent election to act or in any way serve as Alderman.'

"*Door-keeper*. 'Get out; by [oath], I'll show you how!'

"*Alderman Plunkitt*. 'I second the motion.'

"*Mr. Clinton* (at the top of his voice). 'I say, to serve as Alderman after noon of this day. This writ also forbids you receiving any appointment as Alderman from the Mayor.'

“‘Shut the door!’ hallooed James Irving. ‘D—n it, can’t you keep the door shut?’

“*Alderman Coman*. ‘All those in favor of the motion will please say Aye. Carried. This Board for 1871 is adjourned *sine die*.’

“Another uproar at the door, and another tussle between Mr. Clinton and the door-keeper.

“‘I demand admission for the person who has the writ issuing out of the Supreme Court.’

“Mr. Clinton’s voice was heard again.

“‘If you resist the service of this process of the Supreme Court you do it at your peril.’

“*Alderman Coman*. ‘Gentlemen, you will please come to order. The new Board of Aldermen for the year 1872 will please come to order.’

“‘Order, order!’ shouted the Aldermen.

“*James Irving*. ‘D—n it, why don’t you shut the door?’

“*Mr. Clinton* (pausing after every word so as to make it effective). ‘You are liable to be punished for a contempt of the Supreme Court.’

“‘Order, order!’ shouted the Aldermen.

“‘Police!’ cried the door-keeper; ‘I can’t keep them out.’

“*Mr. Clinton* (trying to force the door entirely open by pushing the door-keeper aside). ‘You have no right to sit or act as Aldermen one moment after twelve o’clock of this day [as loud as he could]. Your resistance of the service is contempt of the Supreme Court.’

“*Alderman Coman*. ‘Gentlemen, the first thing in order is to elect officers.’

“The door-keeper pushed Mr. Clinton back. ‘What’s the matter with you?’ he said, in a tone of despair.

“No one in the room paid any notice to what was going on at the door.

“‘You are all liable to be punished for contempt of Court,’ cried Mr. Clinton from the door.

“*Alderman Plunkitt*. ‘I move that Alderman Woltman be elected temporary chairman.’ Adopted.

“*Mr. Clinton*. ‘Let me in, I say.’

"*Door-keeper*. 'I won't; I'm only obeying orders.'

"Alderman Woltman took the chair, and Alderman Coman was proposed as permanent chairman.

"*Alderman Woltman*. 'Alderman Coman is elected Chairman of the Board of Aldermen for the year 1872.'

"*Mr. Clinton* (almost roaring, so loud did he shout). 'I have an order from the Commissioner of Public Works; you must let me in.'

"Mr. Roome, the keeper of the City Hall, when he heard that Mr. Clinton had an order from his superior officer, went out of the room and looked at the order. It was an order entitling Mr. Clinton and the new Board of Aldermen, who were still in the Governor's room, to the possession of the chamber.

"*Door-keeper*. 'You can't come in; none of you can come in.'

"*Mr. Clinton* (to the police officer who had arrived meanwhile). 'I call on you for assistance.'

"*Alderman Coman*. 'Gentlemen, I sincerely thank you for the renewed confidence you have shown in me. I will try'— [Here his voice was drowned by Mr. Clinton's shout.]

"'I want your name,' he said to the door-keeper.

"*James Irving*. 'D—n it! what's the matter? Pitch them out!'

"*Door-keeper*. 'You can't have my name.'

"*Mr. Clinton*. 'I have a right to your name. You will be arrested for contempt of Court. After twelve o'clock—one minute after twelve o'clock—the whole Board can be arrested for contempt of Court. It is five minutes after twelve.'

"*Alderman Coman*. 'Gentlemen, it is moved and seconded that this new Board of Aldermen adjourn until the call of the chair.'

"*Mr. Clinton* (to one of his men). 'Be good enough to tell the gentlemen of the new Board in the Governor's room that this room is ready for them.'

"The man ran away quickly, and soon returned with Mr. Vance, General Cochrane, and all the Reformers.

"*Mr. Roome* (to the door-keeper). 'You will have to let them in.'

"*Alderman Coman*. 'Adjourned.'

"Hardly had the word been uttered when the Reformers poured into the room, and with them a vast multitude. Captain Thorne, with twenty-five officers, rushed in too, to preserve order. Mr. Andrew Shields, the plucky clerk of Mr. Clinton, now flung about the writs. He sprang at every Alderman and pushed the writ in his face. Some of them ran away, and they ran a race round the room before he could serve the writs.

"'I've got them all—all but James Irving,' he said, approaching the famous politician, who at once pushed him aside.

"'You'll have to take the writ,' said Mr. Shields.

"'You [oath] !' said Irving, striking him on the head.

"*Mr. Clinton* (to Mr. Coman). 'You have assumed a fearful responsibility.'

"*Alderman Coman*. 'D—n the responsibility.'

"*Mr. Clinton*. 'We'll see.'

"There was indescribable confusion. The officers tried in vain to clear the room.

"*General Cochrane* (in the midst of the multitude). 'Gentlemen, I move that we organize by calling Mr. Vance to the chair.'

"Confusion. The old members rush for their seats, but find them occupied by the Reformers.

"*Mr. Clinton* (to Mr. Hardy, the clerk). 'You have evaded the law ; you knew it already at nine o'clock that the writs were out. All this was done by your advice.'

"*Mr. Hardy* (in a Pecksniffian tone). 'My dear sir, you are mistaken.'

"*Mr. Clinton*. 'Well, sir, I'll see if you will advise them again. Mr. Irving, did you strike this young lad ?'

"*Irving* (who kept his hands all the time in his pockets). 'I swear I didn't ; by [fearful oath], I didn't. Whoever says so is a [horrible oath] liar.'

"*Mr. Shields*. 'Yes, you struck me.'

"*Irving.* 'You are a [obscene oath] liar.'

"*Mr. Clinton.* 'I thought you wouldn't do any such thing. I knew you too well for that, Mr. Irving.'

"*Irving.* 'By [oath], I didn't take my hands out of my pockets. Whoever says so is a [shocking oath], and I'll put a head on him.'

"*Sun Reporter.* 'I saw it.'

"*Irving.* 'Oh! you must have been mistaken. I tell you, my dear sir, I didn't take my hands out of my pockets.'

"Order was restored. Mr. Vance, a venerable and dignified gentleman, said: 'All the gentlemen who are not members of the Board, and do not belong to the Press, will please step outside the railing.'

"This order having been complied with, the officers formed a solid phalanx in front of the railing. No one could get in, not even the members of the old Board.'

"*Dr. Wilder.* 'Mr. Chairman.'

"*Mr. Vance.* 'Mr. Wilder.'

"*Dr. Wilder.* 'As we have possession now, I move that the rules of the old Board be temporarily adopted, and referred to a committee that will report upon the expediency of making some alterations.'

"The motion was adopted, and Louis Jacobs was appointed temporary sergeant-at-arms. Mr. Shaffer was appointed temporary clerk of the Board.

"*General Cochrane* (speaking in a slow, emphatic, dignified manner, like a general giving orders to his adjutants). 'I move you, sir, that a committee of three be appointed to wait upon the Mayor and inform him of our organization, and that we are ready to entertain his personal presence.'

"Messrs. Cochrane, Gilsey, and Martin went out, and soon returned with a little man in elegant gray clothes, who was accompanied by Colonel Joline. 'The Mayor,' cried one of the officers, and there was profound silence.

"Mr. Vance coughed, and bowed to the Mayor. The Mayor made him a profound bow.

"*The Mayor* (coughing violently and looking quite pale, as if something had very much annoyed him). 'Mr. Presi-

dent, if you will allow me but a few words ; I came to the office of the Mayor of the City of New York at the hour of noon, prepared to disobey the writ of prohibition which was served upon me last Saturday, because I was instructed by Counsel learned in the law that it was, upon its face, null and void, because a writ of prohibition could only issue to a Court on a motion in a higher Court. I came for the purpose of solving all legal doubt, and for the purpose of performing a pledge which I have long ago entered into, of appointing the old Board of Aldermen and Assistant Aldermen. [Here his Honor drew some breath and adjusted the splendid velvet collar of his coat.] I found that they had seen fit, on their part, without seeking a conference with me, without appearing to seek a conference with me, to take hostile action against me, both personally and officially. You are, therefore, in accord with me, and I have an opportunity to do as I please. You have two titles for the office of Aldermen. If you are elected, that's one title ; if you are not elected, why then you are appointed. [Laughter, and Mr. Hall looked as he does when he has committed an atrocious joke.] Gentlemen, I appoint you as Aldermen, and I'm prepared to administer the oath of office to you.'

"Colonel Joline took out of his hat a half-dozen blanks of oaths of office, and, with the tone of a pastor, Mayor Hall swore them in. Then he made a profound bow to Mr. Vance and went from the room, holding his silk hat high in his hand.

"*General Cochrane.* 'I move you, sir, that this Board of Aldermen now resolve itself into the Board of Supervisors for the County, and ask the Mayor to take the chair.'

"The written request having been drawn up, the Mayor was sent for. He took the chair with dignity. He suggested that the room of the Board of Aldermen be also used by the Board of Supervisors. Adopted.

"*Alderman Van Schaick.* 'I move that the Mayor be requested to appoint the committees and announce them at the next meeting.'

"*Mr. Hall* (evidently accommodating). 'I will appoint

the committees just as I think the Supervisors desire them to be appointed.'

"After the Mayor had again withdrawn, the Board of Aldermen continued its meeting.

"*Mr. Van Schaick*. 'I move, when this body adjourn, that it adjourn until Thursday afternoon, at one o'clock.'

"*General Cochrane*. 'I move that the resolution by which the old Board of Aldermen impeached the Mayor be rescinded.' Unanimously adopted.

"A protest (signed by John Dilger) was read against admitting Alderman Plunkitt to a seat. Referred to a special committee.

"General Cochrane paid, in a few words, a touching tribute to the memory of Michael Carroll, his dead comrade.

"*Alderman Wilder*. 'I move that a committee of three be appointed to take such further action in the interest of the Board as they may think necessary.' Adopted.

"The chair appointed General Cochrane, Dr. Wilder, and Mr. Van Schaick such committee.

"*General Cochrane*. 'I offer the following :

"*Resolved*, That, congratulating our constituents that we have been thus far enabled to successfully sustain the burden of duty devolved on us by our election to the honorable office of legislators for this great city and county, we hope to merit their continued support by faithfully and thoroughly discharging, without partisan bias, all the obligations to the cause of municipal reform which public opinion recognizes and our convictions impose.' Adopted.

"General Cochrane next delivered a glowing speech, in which he duly celebrated the victory thus far gained.

"Mr. Vance offered a resolution directing the clerk to report the names of his employés, their hours of labor, compensation, etc., with a view of cutting down expenses, and another resolution directing him to furnish the names and the amount of compensation of all the employés under the old Board.

"Then the Board adjourned.

"Late in the afternoon Mr. Shafer, the clerk of the new

Board, took possession of the clerk's office, and Mr. Roome has given notice to the members of the old Board that they must surrender the keys to the desks, etc."

Mr. Clinton, in drawing the writs of prohibition, made them returnable on the second Monday of January, at twelve o'clock, noon, so as to give the would-be "hold-overs" just one week in which to consider whether it was desirable on their part to further contest the rights of the Reform Aldermen and Assistant Aldermen to their seats. They soon reached the conclusion that "discretion was the better part of valor"; and that it was useless to make any further contest. Upon the return of the writs they failed to appear, and judgment absolute was rendered against them. Thus ended the litigation on the part of the Reformers to obtain seats in the Common Council.

CHAPTER XXVII

TRIAL IN MARCH, 1872, IN THE NEW YORK GENERAL SESSIONS,
OF A. OAKLEY HALL, MAYOR OF THE CITY OF NEW YORK,
UPON A CHARGE OF NEGLIGENCE OF OFFICIAL DUTY

Opening Address of Mr. Clinton to the Jury, Containing a Statement of the System of the Tweed Ring Frauds ; also Astounding Figures Showing the Magnitude of the Frauds in Respect to the Court-house of New York City.

A. OAKLEY HALL, Mayor of the city of New York, was indicted in the Court of General Sessions for the City and County of New York, under a section of law, Chapter 382, of the laws of 1870, which reads as follows :

"Section 4. All liabilities against the County of New York incurred previous to the passage of this act shall be audited by the Mayor, Comptroller, and present President of the Board of Supervisors, and the amounts which are found to be due shall be provided for by the issue of revenue bonds," etc.

The indictment charged that Mayor Hall, as a member of the Board of Audit, neglected to examine and audit one of the claims therein specified. His trial commenced on the 26th day of February, 1872, in the City of New York, Hon. Charles P. Daly, Chief Judge of the New York Common Pleas, presiding. Lyman Tremain, Wheeler H. Peckham, and Mr. Clinton acted as Counsel for the prosecution.

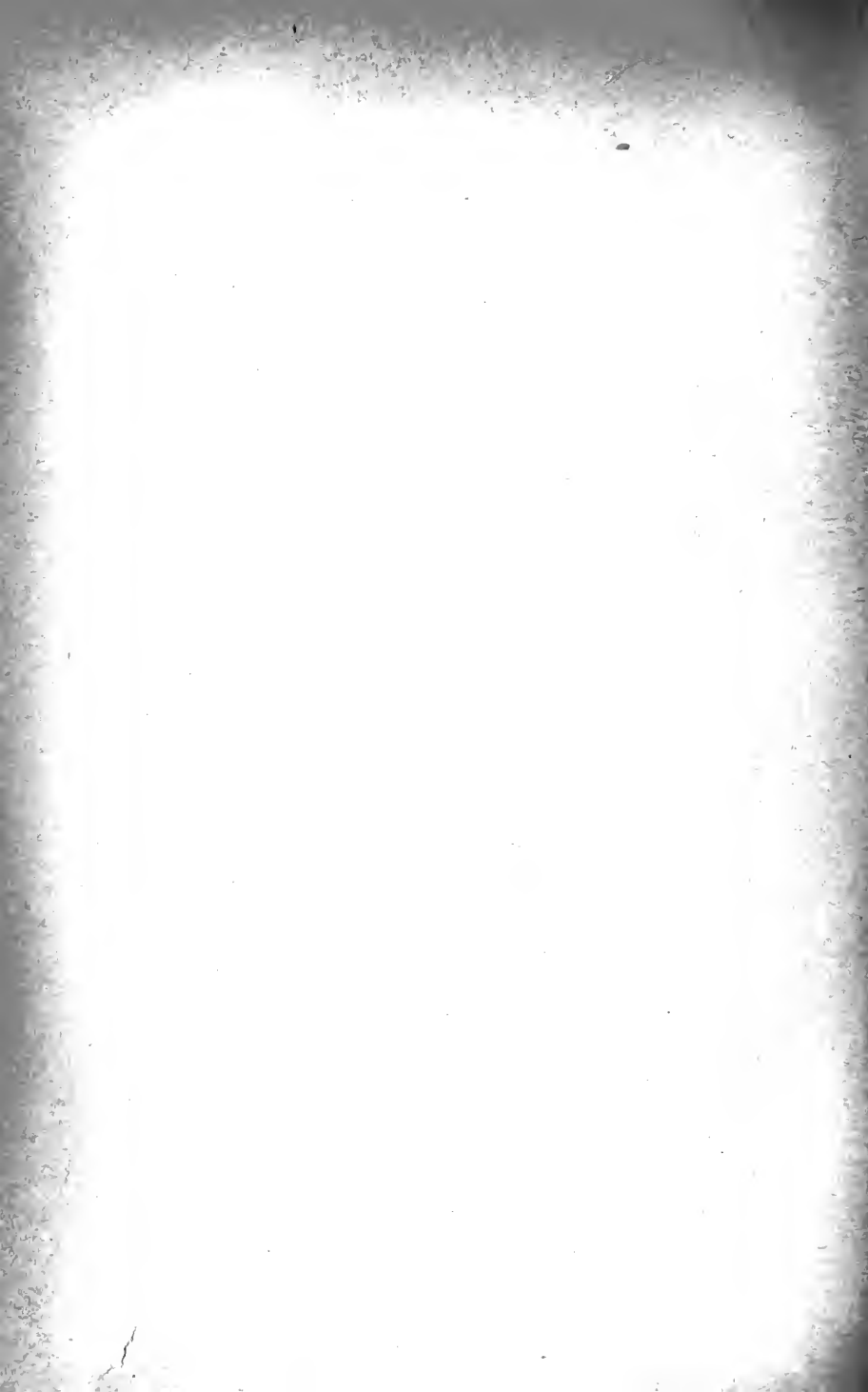
E. W. Stoughton, John E. Burrill, James M. Smith, Ira Shafer, Thomas T. C. Buckley, Joel A. Pithian, and

A. J. Vanderpoel (of the defendant's law firm, Brown, Hall & Vanderpoel) appeared as Counsel for the defence. Several days were occupied in impanelling the jury. Everything depended upon the selection of a fair, impartial, and intelligent jury. This branch of the case Mr. Clinton attended to. Before the trial came on he examined the list of jurors carefully, and became familiar with the character, antecedents, and associations of all who were liable to be called. By reason of his professional, political, and personal associations, he was able to obtain very accurate information on the subject. He did not desire that any friends of the prosecution should go upon the jury; he was determined that none of the special friends of the defendant or of any member of the Tweed Ring should be impanelled. Nearly, if not quite, all the jurors who presented themselves were challenged by one side or the other for principal cause and to the favor. They were examined and cross-examined thoroughly. The first two jurors selected became triors of challenges to the favor. It was not an easy task to select a fair and impartial jury. Mr. Clinton succeeded, however, in keeping out of the jury-box all who had any affiliations with the Tweed Ring. With respect to challenges for principal cause, the questions involved were purely those of law. If the juror had a fixed and decided opinion as to the guilt or innocence of the defendant, the law rendered him incompetent to serve, and it was easy for the Court to so decide. But with regard to challenges to the favor, the triors had a large discretion. They could infer from almost any facts or circumstances that the juror was or was not impartial. From his manner, from his appearance, or from his evident anxiety to get on the jury, the triors could draw the inference that he was biased and unfit to serve, and therefore find the challenge true, even although the answers of the juror would imply that he was entirely



HON. CHARLES P. DALY

Chief Judge of the Court of Common Pleas of the County of New York



unbiased. After the first two jurors were selected and became triors, they generally sustained the position taken by Mr. Clinton, and found the challenge true, or not true, accordingly. In other words, they rejected nearly every juror whom he asked them to reject; and they admitted upon the jury nearly all whom he asked them to admit. This was simply because they thought Mr. Clinton was right; for he was not acquainted with either of them, although he knew that they were straightforward, honest men. The result was that an excellent jury was obtained. On the 1st of March, 1872, Mr. Clinton made the following opening address to the jury, which occupied the entire day:

"May it please the Court—Gentlemen of the Jury:

"Sad and mournful is the spectacle this day presented. The first magistrate of our city is arraigned for trial in a criminal court upon a charge of most serious character. If he be guilty, the disgrace falls not alone upon him and those near and dear to him, but upon a million of people on this island. If he be not innocent, his guilt is a pall of infamy overhanging our city. In his fate, as in that of every person, however humble or obscure, placed upon trial at this bar, the people have a deep and abiding interest. If injustice and wrong in our criminal Courts be dealt out even to the most unimportant individual in our midst, an outrage is inflicted on the whole community. To the fate of our chief magistrate no one can be indifferent. The law, while it invests him with dignity, clothes him with protection commensurate with his high office. But high as may be his official position, it is not higher than the law; elevated as he is, he is not above the law. If he violate the law—if he set at defiance the criminal law, Justice, blind though she be—blind though she has been too long—will put her hand upon him with as firm grasp as upon the meanest and

the most lowly in the land. Wealth nor robes of office can protect him. Those who flock to the temple of Justice will look in vain for the inscription at its portals :

“‘Plate sin with gold,
The strong lance of Justice hurtless breaks ;
Arm it in rags, a pygmy straw doth pierce it.’

“With me this day begins the most painful duty of my life. Since I first met the defendant at this bar, and was introduced to him by the late N. B. Blunt (then District Attorney-elect) as his appointee to the office of Assistant District Attorney, more than twenty years have rolled by. Since then, when we were both young, often have we crossed forensic swords. Many have been the trials of deep and absorbing interest in which we have been opposed, not a few of them equalling, if not surpassing, the present.

“Only a deep and stern sense of duty could induce me to appear here as the prosecutor of one who, at this bar, has so often and so successfully prosecuted others. I regret, gentlemen, that during the preliminary examination of jurors in this case an attempt was made to induce you to believe that, on the part of Counsel connected with the prosecution, motives of personal animosity existed. So far from that, if I know my own heart, I have no personal ill feeling whatever in respect to this defendant. I will disguise nothing from you, gentlemen. I will not deny that, although we both belong to the same political party—he to one branch and I to another—for the last two years I have opposed him and those connected with him—the Tammany Ring. I have denounced that organization. I have made many speeches upon that subject, but, so far as any personal feeling is concerned, I never entertained any towards him ; and it was not until yesterday that I knew, or had any reason to

believe, he indulged in a feeling which, were he not on trial, I should characterize as petty malice or childish spite on his part. I regret the exhibition of it, and I assume that the Counsel did him injustice, for I do not wish him—the defendant in this cause—to encounter at your hands any such prejudice as would be likely to result from such conduct. I therefore ask you to dismiss that from your minds, and not to attribute to this defendant any of these ill feelings of petty malice or spite which may have been supposed to exist from the conduct of one of his Counsel. Look at him, gentlemen, as a person charged with an offence, entitled to a fair and impartial trial at the hands of a jury of his peers; and, although we may think that the other side, in some respects, have committed error in regard to scenes which have been enacted before most of you, yet, if they have given rise to any prejudice against the defendant, I trust you will dismiss it entirely from your minds.

“I come before you, gentlemen, at the request and by the appointment of the Attorney-General of the State. My associates occupy the same position. It is the position occupied by his Honor upon the Bench, who, by the request of the same high officer, has kindly consented temporarily to leave the Court of which he is the honored Chief-Justice and preside over your deliberations. When designated by the chief law officer of this State as suitable and proper professional gentlemen to conduct this cause, my associates and I did not feel at liberty to decline the important duty assigned us. In my judgment it would have been cowardly and unmanly on our part to shrink from the duty imposed upon us. I know that no one of us will shrink from that duty. At the same time, we will discharge it fairly, honestly, faithfully, and impartially.

“Gentlemen, we cannot disguise the peculiar situation of affairs in our city which has given rise to this prose-

cution. While I would desire to keep politics as far as possible out of this cause, yet we cannot ignore that which we all know, that a great reform movement recently swept over this city like a tornado, uprooting infamous abuses of long standing and scattering to the four winds the conspirators against the public welfare and the public treasury. We all know that during the last summer this community was astounded by the discovery of frauds upon the city treasury of the most gigantic character. And it was well that the publication was made, for, in a very few years, at the rate we were progressing, this city would have been bankrupt, to say nothing of the demoralization which was spreading throughout this community.

On the 1st day of January, 1869, the city and county debt of this city was.....	\$36,293,929.59
On the 1st day of January, 1870, it had increased to.....	48,033,741.59
On the 1st day of January, 1871, it had increased to.....	73,373,552.02
On September 4, 1871, it had in- creased to.....	97,287,525.03

“At the rate this debt was increasing, assuming that the city property doubled in ten years, it would have taken but just ten years for that debt to equal in amount all the property, real and personal, in this city. In eighteen years, had the debt thus continued to increase, doubling in two years—in fact, it was doubling every year and a half—it *would have been greater than all the property, real and personal, in the United States!* No wonder, therefore, that the public attention was aroused by this state of things. No wonder that charges of infamous misconduct were made against high officials. I ask you, gentlemen, not to visit upon

this defendant any prejudice arising from that fact; not to visit upon him the consequences, except so far as we are permitted to prove in evidence his connection with one of the frauds, which forms the subject-matter of the present indictment.

“It will be impossible for me to present this cause properly before you—to do justice to the people or to the defendant—without calling your attention to the law which clothes him with certain powers. The law upon this subject will have a material bearing upon the question, whether the defendant properly discharged his duty in the particular case set forth in the indictment.

“In the observations I shall submit to you, gentlemen, I shall pursue the following order:

“1. I shall direct your attention to the extraordinary opportunities the law afforded the defendant to ascertain all about the frauds connected with the Board of Audit claim specified in this indictment, and kindred frauds connected with that Board.

“2. I shall endeavor to show you that the law gave the defendant particular and special notice of the frauds in regard to the County Court-house, including the fraud specified in this indictment.

“3. I shall call your attention to the duties of the Mayor, enjoined upon him by law, in reference to the alleged claim specified in the indictment, and kindred claims.

“4. I shall call your attention to facts, showing that the defendant must have known, and in point of fact *did* know, that the claim set forth in the indictment was fraudulent, if not altogether fictitious, and that he wilfully and deliberately omitted and neglected, as a member of the Board of Audit, to audit or examine the same.

“First, as to the opportunities afforded to the defend-

ant by law to ascertain in regard to the frauds specified in the indictment and kindred frauds. Under this head I shall call your attention to the extraordinary powers conferred upon him.

“You are all aware, gentlemen, that in 1870 a Legislature, Democratic in both branches, and a Democratic Governor carried on our State government. You are also aware that during that year a charter for this city was passed; and it will be for the purpose of showing you the opportunities the Mayor had to ascertain the existence of the frauds, and particularly of the fraud charged in this indictment, that I will call your attention to the powers with which that charter clothed him. That was a most extraordinary charter. You have heard much about it. It was a charter concocted—at least some of its provisions were drawn—for the express purpose:

“1. To cover up past frauds.

“2. To enable those in power to commit new ones.

“3. To prevent the people electing new rulers.

“4. To protect from punishment those who had been guilty of frauds.

“The Mayor, by this charter, was permitted to appoint all the heads of departments, except the Comptroller and the Corporation Counsel. Prior to that time the heads of the various departments had been nominated by the Mayor and confirmed by the Board of Aldermen. No such extraordinary power was ever conferred upon any other Mayor. After the charter had passed, reserving to the people the right (which for many years they had possessed and exercised) to elect the Corporation Counsel and the Comptroller, a tax levy was passed on the 26th of April, which took away from them that power and conferred it upon the Mayor. Now, gentlemen, extraordinary powers were conferred on Mayor Hall—powers which never had been confided to any

other Mayor, and which, in my judgment, never will be given to any succeeding Mayor. He, of his own volition, without consulting any human being, was permitted by this charter to appoint the following heads of departments :

“To the Finance Department, a Comptroller.

“To the Law Department, a Corporation Counsel.

“Four Commissioners of Police, constituting a Board of Police.

“A Commissioner of Public Works.

“Five Commissioners of Public Charities and Corrections.

“Five Commissioners of the Fire Department.

“Four Commissioners of the Health Department.

“Five Commissioners of the Department of Public Parks.

“One Superintendent of Buildings.

“Five Commissioners of Docks.

“Twelve Commissioners of Public Instruction.

“So that, gentlemen, for the first time in our history, *our Mayor constituted the entire city government*. There is not a city on the continent of Europe where, in my judgment, so much power is conferred upon the Mayor. Another provision of law incorporated in that charter gave him the power to call upon the heads of departments to make reports to him of the condition of their respective departments. No power existed on the part of any tribunal, on the part of any Court, on the part of the Common Council, on the part of the citizens, on the part of anybody in this city, other than the Mayor, to bring from those various departments any reports for the information of the public. He was the only man who could unearth frauds.

“I will call your attention to the specific provision of law upon that subject. Section 31 of the charter (passed April 5, 1870) provides as follows :

“‘Section 31. The said departments shall, at such times as the Mayor may direct, make to him, in such form and under such rules as he may prescribe, reports of the operations and action of the same, and each of them, and shall always, when required by him, furnish to him such information as he may demand, within such time as he may direct.’ (Laws of 1870, page 373.)

“Whose business was it to ascertain the state of facts existing in each department? Whose duty was it? The Mayor’s. He was the only man who held the key that could unlock these frauds and spread them before the public. Therefore you will perceive that the most grave responsibility was cast upon him—a responsibility from which he had no right to shrink.

“There is another provision of that charter to which I will call your attention. By the Constitution of our State, the Supreme Court, the Superior Court, and the Court of Common Pleas had the power to appoint their own officers. The Constitution provided that these Courts should have the powers which they formerly possessed. One of these powers was to appoint their own officers. In violation of this constitutional right of these Courts, the following section was incorporated in the county tax levy which passed April 26, 1870 (Laws, 1870, page 880):

“‘Section 9. Attendants on the several Courts in the City and County of New York, except Police and District Court officers, shall be appointed and removed, and their compensation fixed, by the Comptroller, but shall not be greater in number than at present.’

“By this section another member of this Board of Audit was invested with this most extraordinary power. It was necessary that the entire power of the city be concentrated in four persons. Why was this done? The object was that every officer attending the Courts should

be under the control of one or more of the members of the Board of Audit. Not an officer could appear here except by the consent of one of these three members. He could not draw a dollar of pay except by the consent of one of these members. The Comptroller, under this iniquitous provision, would be allowed to give one officer a thousand dollars, another five hundred, and another one hundred, or any sum he saw fit. What was the object? To get all the power within the hands of four men, as I shall show you presently. Section 1 of the city tax levy contained the following provision (Laws, 1870, page 888):

“The Mayor and Comptroller are hereby authorized to fix the salaries of the Civil Justices of said city, or any or either of them, as they may deem the legal business of the respective districts to justify, not exceeding the salary now paid to Police Justices of said city.’

“The salary paid to Police Justices was ten thousand dollars a year—several thousand dollars more than the salaries paid to Justices of the Supreme Court of the United States. The Mayor and Comptroller—mark the intimate relations between the two—were permitted to fix the salaries of all the Civil Justices in this city. They could fix them at any sum they saw fit, not exceeding ten thousand dollars. Look at the power placed in their hands. What was the object? Why, the Mayor could go to a Judge and say, ‘Here, I will put your salary at three thousand dollars, five thousand dollars, eight thousand dollars, or ten thousand dollars, according to the extent to which you are my supple tool and instrument.’ It is a most extraordinary power. That power was placed in the hands of these two men. Then, again, look at the series of legislative acts which clothed this Mayor with—I had almost said omnipotent power. Why, I shall ask you, by-and-by, on the facts of this

case, to say whether a man who had such extraordinary opportunities and facilities to ascertain the existence of frauds—the only man in the city who had the power to ferret them out and expose them—is not chargeable with a knowledge of the existence of such as were perpetrated by those with whom he was so intimately associated.

“Another section of the city tax levy provided that the Mayor of the city might designate the Police Justices who should constitute the Court of Special Sessions (Laws, 1870, page 917), which is the intermediate Court between the Police Justice and this Court (the Court of *General Sessions*). Now, why was this? The object was to enable the Mayor to assign his particular friends to that Court, who would look after his interests and the interests of his immediate associates upon this Board of Audit. That is a fearful power to give one man—to permit him to organize a Court, authorized to send to prison or to set free thousands upon thousands of persons appearing before it as criminals! It is a most extraordinary and dangerous power, that ought never to be conferred upon one individual.

“Before the passage of the charter of 1870 our Common Council possessed what is called legislative powers. Nearly all those powers were taken from them by this charter and conferred upon four men—the Mayor, Comptroller, President of Public Parks, and the Commissioner of Public Works—A. Oakey Hall, Richard B. Connolly, Peter B. Sweeny, and William M. Tweed. Before this it was for the Common Council to designate the number of clerks of each department and to regulate the operations and expenditures of the various departments of the city government; but by the charter all that power was taken away and conferred upon those four men. They were made legislators. They were made not only Mayors and Comptrollers, but they were

made a Common Council. They were almost made Judges. In fact, in them was concentrated all the legislative and administrative power in the city. It was provided in the charter that the heads of departments may :

“ ‘Appoint and remove all chiefs of bureaus (except the Chamberlain), and also all clerks, officers, employés, and subordinates in their respective departments. [To that no objection need be made.] The number of all officers, clerks, employés, and subordinates in every department (except Police and Fire) *with their respective salaries or compensations, shall be such as the head of each department shall designate and approve, except that the aggregate expenses thereof shall not exceed the total amount duly appropriated by law to each department for such purpose.* (Laws of 1870, page 373, section 32.)

“ Now look at this fearful power. Prior to this, as I have told you, the Common Council fixed and regulated salaries; but by this charter—which will figure conspicuously in this cause when we come to give our evidence in relation to the identical fraud charged in the indictment—the head of each department could give any salary he pleased to any employé or subordinate. Under this charter Mr. Tweed could have given one clerk one thousand dollars a year and another clerk a salary of one hundred thousand dollars, and there was no law to prevent it.

“ Another peculiarity was that these departments kept their proceedings to themselves. Each department kept its own record, and Mayor Hall alone could compel them to make known their proceedings to the public. The Fire Department, and all the departments, could do exactly as they pleased, subject to the will of these four persons, chief of whom was Mayor Hall, as I will show you presently.

“ The Common Council were prohibited from passing

any ordinance in relation to the internal affairs of any department. Section 102 of the charter provided as follows :

“‘The Common Council shall never pass an ordinance in relation to regulating the internal affairs of any of the departments herein authorized, or the workings of any of the bureaus, or the duties of any of the subordinate officers of the corporation, or the number of persons to be employed in said department, nor increasing their salaries, *except upon the previous application in writing therefor of the head of the department* to be affected by said ordinance.’ (Laws of 1870, page 391.)

“That is to say, the local legislature—the Common Council—of the city, elected for the express purpose of guarding the interests of the people, of ferreting out fraud, of protecting the taxpayers and citizens against corruption in any and all the departments of the city government, are permitted to do nothing to save the city from impending bankruptcy and ruin. The Common Council, the only representatives of the people in the city government, can interpose no obstacle to the consummation of frauds, though they be so gigantic as to involve the city in universal and irretrievable ruin. All power was taken from the Common Council and concentrated in four individuals, at whose head was the Mayor. Dark as was the prospect, some looked forward to emancipation from the power of the four, and thought that, in the kindness of Providence, death might overtake some of them, and in that way relief might come to the people. The future was shrouded in impenetrable darkness by section 107 of the charter, which reads as follows :

“‘The power of making appointments herein conferred shall only be exercised by the Mayor elected to that office, and not by an acting Mayor; and in the event of the death,

resignation, or removal of such elected Mayor, such power *shall devolve on and be exercised by the Comptroller of said city.* In case of any vacancy in any head of department or chief officer thereof, it shall be filled for the full term in the like manner as if it were an original appointment to such office, except where herein otherwise provided for.' (Laws of 1870, pages 392-3.)

"The charter provided that the Mayor might appoint these different heads of departments for four, six, and eight years; so that we had to look forward to the far-distant future for any reformation in our municipal government; and yet, if, by some providential dispensation, we should be relieved of the Mayor, or he should resign, or travel in Europe, or be gone for a considerable length of time, it was hoped that there would be some relief. But no! In that event the Comptroller—Mr. Connolly—is to appoint all the heads of the departments. The Comptroller should no more be clothed with that power than should the head of any other department.

"Gentlemen, I have called your attention to some of the enormous powers vested in the Mayor and his associates. When this charter passed, although it deprived us of nearly all our municipal rights, it left a few. It reserved to the Common Council the power to provide for and regulate the opening, widening, and extending of streets below Fourteenth Street; and yet a few days afterwards this right was taken away by legislation, which, I fear, was influenced by the very money of which the city treasury was plundered—a part of it, I am afraid, was secured through that Board of Audit. That Legislature which on the 5th of April passed the charter, on April 26th passed a tax levy for the City of New York. This was smuggled through, members not knowing for what they voted. Section 30 (Laws of 1870, page 905) takes away this power of the Common Coun-

cil and confers it on the Mayor, Comptroller, Commissioner of Public Works, and Commissioners of Taxes and Assessments (appointed by the Comptroller). So even the power to regulate and take charge of the streets below Fourteenth Street, which the charter had left to the Common Council, was taken away. Mark you, gentlemen, every statute that passed conferred power on four individuals. No statute went outside of the four. In this case, it is true, that to the Mayor, Comptroller, and Commissioner of Public Works were added the Commissioners of Taxes and Assessments, but they were appointed by the Comptroller, and represented him, and him alone.

“ I will call your attention to another provision. Suppose assessments were made upon your property, and you thought you ought to have some relief. Suppose the foreman of the jury should be assessed five hundred dollars, and Mr. Reed, another juror, should be assessed twenty-five hundred dollars on property of no greater value. One of you would like to have some relief. To whom would you apply? You would have to go to the Mayor, the Comptroller, and, I think, the Commissioner of Public Works, a Board substantially composed of the same gentlemen. Now when departments made estimates for the expenses of the next year, who were to dispose of that subject? Departments such as Public Works, Board of Health, Board of Fire Commissioners, Board of Police, were to estimate the amounts wanted for the ensuing year, and those amounts were to be revised by the President of the Board *and the Mayor and Comptroller*. In other words, the Mayor controlled all these departments — first, by appointing to office the heads of them; secondly, by his power to call them to account; thirdly, by determining, in connection with the Comptroller, how much they should expend during the year. The Mayor was allowed, by his single voice, to

prohibit the expenditure of any particular sum or sums of which he did not approve. That is to say, he and the Comptroller were clothed with absolute power to allow the amount estimated, or to cut it down, as in their wisdom they saw fit. After these various boards had fixed upon the amount they desired, and it had been sanctioned by the other board, composed of the Mayor and Comptroller and the president of the department, then the Supervisors were compelled by law to raise that amount. The Supervisors were merely clerks to this combination of individuals, called 'The Ring.' If the amount were fifty per cent. more than it ought to be, if amounts were imposed so as to permit these enormous frauds to go on, the Supervisors, no matter how unwilling they might be to aid in the perpetration of these frauds, had no check upon them. The law says they shall raise whatever the Mayor, Comptroller, and the presidents of these different departments shall direct.

"I have shown you that the Mayor and the Comptroller, and, incidentally, the President of the Public Parks and the Commissioner of Public Works, had entire control of the appointments of the departments, of the internal working of the departments, and of the estimates for the current year. Now who had the power of making appropriations? Appropriations for each year were to be estimated (section 101 of the charter, as amended afterwards) by a board, consisting of the Mayor, Comptroller, Commissioner of Public Works, and the President of the Department of Public Parks. They were to meet immediately (this is in 1871), and after that on or before the 1st of December of each year, to make and agree upon an estimate of the various sums of money which, in their discretion, would be required to defray all the expenses necessary for conducting the different boards, commissions, and departments,

whether executive, judicial, legislative, or administrative, of the city government; and also for paying interest and principal on the city debt, etc.; and thereupon to fix and determine the amount of all such estimates, which amount, when so established by said Mayor, Comptroller, Commissioner of Public Works, and the President of the Department of Public Parks, by the concurring vote of all present, thereby became appropriated as the amount of money required.

“We trace these laws through to this result: first, the Mayor has the power to appoint the heads of departments; then he and the Comptroller, the President of Public Parks, and the Commissioner of Public Works have finally got the power, not only to control all the departments, but they hold the purse-strings of the entire city. Not an official—not a man in the whole city—can draw a dollar—not even his Honor upon the Bench nor the Judges in any of our Courts—except by the permission of these four individuals, chief among whom is the Mayor. So that you will perceive they have finally absorbed all power.

“At length, in 1871, by the laws of 1871 (chapter 583, page 1269, volume 2), the same officers (Hall, Connolly, Tweed, and Sweeny) are created a Board of Apportionment; and, after providing for the payment of principal and interest on bonds, etc., of *city and county*, falling due in that year, and for State tax, etc., it is provided that they ‘shall apportion the remainder thereof (*i. e.*, the moneys raised under this act, known commonly as the two per cent. act) among, and set apart to, the various *departments and purposes* of the city and county government by the concurring vote of *all* the members of said board present,’ etc. The voice of any one of them is sufficient to stop any appropriation. It is provided that ‘the said board, etc., shall have power, etc., to *limit and transfer* appropriations which are found

to be in excess of the amount *required or deemed* to be necessary to such other purposes as they shall find to require the same.'

"After power has been conferred on them to regulate everything, to control everything, to disburse all the money after provision has been made for everything that human ingenuity can suggest, lest there be some outlet of the public treasury that they have not thought of, they are clothed with the power to appropriate to '*other purposes*' whatever they see fit. What those '*other purposes*' may be will be readily suggested to you by the gigantic and astounding frauds exposed to the public during the past year. And, what is more, these four may '*regulate all salaries of officers and employés of the city and county government.*' During this last year they actually got a law passed by which they were permitted *to fix the salaries of every officer of the city government.* [Mr. Stoughton, Counsel for the defence, here interrupted, and claimed that it was not proper for Mr. Clinton to state the provisions of the city charter, on the ground that the members of the Board of Audit acted as county and not city officers. After some observations from the Court, Mr. Clinton proceeded as follows:]

"Gentlemen, I can only say that we propose to unfold to you the law applicable to this case. Every provision of law which I have cited I believe to be pertinent to the opening, and in some of its aspects will be pertinent to this case when you finally come to dispose of it.

"Now, gentlemen, I have traced these various provisions in different statutes down to the point which clothes four officers—four individuals—with absolute power over the city. Not a dollar can be drawn from the public treasury; not a dollar can be appropriated for any purpose whatever; even his Honor upon the Bench could not draw his salary without the signature of two, at least, of these officials. What is more, gentlemen, any

one of them can stop an appropriation. After an appropriation or an estimate has been made, any one of them can cut it down to any figure he sees fit.

“There is another provision of law to which I will call your attention. Prior to this charter—before the spring of 1870—the Mayor had simply a veto upon the action of the Board of Supervisors. If I remember correctly, he could veto anything which passed that board, with perhaps the exception of taxes. Still, that board, by a majority vote, could pass the resolution or ordinance over his veto, and it would then become a law. But now a new order of things is inaugurated. By the statute (passed 12th of April, 1870, chapter 190, section 2) which abolished the old Board of Supervisors and created a new board, to be composed of the Board of Aldermen, the Mayor, and Recorder, it was provided that any resolution, ordinance, or act which passed that board should not be a law unless it received the *concurring vote of the Mayor*. After the Ring got all these enormous powers, and created a new board, lest by some hook or crook a majority or two-thirds or three-fourths of the Board of Supervisors might wish to pass some bill not agreeable to all of the four persons, the Mayor was clothed with an extraordinary power that amounted to an absolute veto—that is to say, no bill could pass that board if the Mayor said he was opposed to it. If the Mayor was present, and did not vote for it, the vote of every other Supervisor present went for nothing.

“Gentlemen, I have thus hurriedly glanced at the extraordinary powers conferred on the Mayor, and the opportunities the law afforded him to ascertain the exact condition of the affairs of the city, and especially of those matters which came before the Board of Audit.

“What better facilities for knowing the character of the claims which came before the Board of Audit could be afforded any one than were thus furnished to the de-

fendant? The fraudulent character of the claims which came before that board, so far as they related to the Court-house, could be easily ascertained by any one who took the slightest interest in the subject. It will be for you to say whether the defendant, who was clothed by law with such extraordinary powers and possessed such remarkable facilities for investigation, was, in point of fact, or by possibility could have been, ignorant of the fraudulent character of these claims. The Counsel told you that this was a county board. That is true. But city officers were appointed to that board. The Mayor was a city officer. The Comptroller was a city officer. The Commissioner of Public Works was a city officer. So, although that was a proceeding on the part of the county, yet it was by city officers; and the city and county, in the various laws, and in the practice in reference to the execution of them, are so intermingled that it is difficult to separate the one from the other. The city and county, as you are aware, possess exactly the same boundaries. In the country a county means something very different from what it does in New York; but here, where the boundaries are the same, the difference between the two is almost an abstraction. I will now call your attention to my second proposition.

“The law gave the defendant particular and special notice of the fraud in regard to the County Court-house claims.

“Gentlemen, this is an indictment for a wilful neglect of duty in not auditing a particular claim which formed one of a large number of claims. This claim related to the County Court-house—the building in which you sit at present. It was important, therefore, that the Mayor should take notice of laws passed upon that subject. Every one is chargeable with knowledge of the law, and certainly a lawyer of over twenty years’ experience, when Mayor of the city, is chargeable with a knowledge

of the laws applicable to the city or to the county. Now, gentlemen, on the subject of whether this act of the Mayor was wilful, it will be quite important that your attention should be directed to the various statutes upon the subject of this County Court-house. They are curious in some respects. In 1858 (Session Laws, pages 510 and 511, chapter 318, sections 1 to 5) provision was made for the appointment by the Mayor and Supervisors of 'Commissioners of the new City Hall.' The duty of the Commissioners (section 6, page 511) is as follows:

“‘Section 6. It shall be the duty of the Board of Supervisors of the County of New York, whenever called upon by said Commissioners, to raise a sum not exceeding two hundred and fifty thousand dollars, by the creation of a public stock, to be called the City Hall Stock, which shall be redeemable in the year eighteen hundred and seventy-five, out of the sinking fund of the City of New York, and shall bear an interest of six per cent. per annum, and the said *building, with all its finishing and furnishing, ready for use, shall not cost any more than the said sum of two hundred and fifty thousand dollars.*’

“Gentlemen, I call your attention to this extraordinary provision, that the sum to be expended for building the Court-house shall not exceed ‘the said sum of two hundred and fifty thousand dollars.’

“It only shows the extreme verdancy—inexperience—of those who legislated for this city on that subject in 1858. Since then we have made such rapid progress in finance that I think those who concocted that law must have belonged to an antediluvian race. That act was finally abandoned. Nothing of any importance was done under it.

“The next we hear on the subject of this Court-house is that in 1861 (Session Laws, page 564, chapter 240, section 1) there is the following provision:

“‘The Board of Supervisors of the County of New York are hereby empowered and required, as soon as conveniently may be after the passage of this act, to order and cause to be raised by tax, various sums, among others the following : Construction of new Court-house, fifty thousand dollars.’

“That was a very small matter. The work was begun in earnest in 1862.

“I now call your attention to the laws of 1862 (Session Laws, page 335, chapter 167, section 1), as follows :

“‘Section 1. It shall be lawful for the Board of Supervisors of the County of New York to raise, by loan, from time to time, a sum of money not exceeding ten hundred thousand dollars, by the creation of a public fund or stock, to be called “The New York County Court-house Stock,” which shall bear an interest not exceeding seven per cent. per annum, and shall be redeemable in such annual instalments, commencing in the year eighteen hundred and seventy-five, as the said board shall provide.’

“Here, gentlemen, the work starts in earnest. A million of dollars is appropriated. I think you, as practical men, will say that for this sum, had the work progressed with proper rapidity, the Court-house might have been completed and furnished in much better style than at present.

“The next we hear of the subject is in the laws of 1864, page 497, chapter 241, section 1. And this is, I believe, the first of these annual appropriations for the *completion* of this Court-house. Section 1 is as follows :

“‘Section 1. The Board of Supervisors of the County of New York are hereby authorized, from time to time, to raise by loan, in the manner provided in the act, chapter one hundred and sixty-seven, laws of eighteen hundred and sixty-two, a further sum of eight hundred thousand dollars for

the construction and *completion* of the New York County Court-house.'

"Although a million was ample in 1862, yet now two years have rolled around, and but little progress has been made. From that time this became a fund for extravagance and corruption. The Legislature, in 1864, never contemplated the appropriation of another dollar for the Court-house. They had made one appropriation of a million, and, two years afterwards, when importuned on the subject, they had appropriated enough, and more than enough, to complete it. And hence that body was careful to provide that the sum appropriated was for the '*construction and completion*' of the New York County Court-house. The other act, I think, was only for the construction of it. We have now reached the point of completion. The Court-house is to be finished for the sum appropriated. I will also call your attention to the manner in which the payments were to be made. Section 3 provides :

" 'No portion of the moneys hereby authorized to be raised shall be used except in payment for work done and materials furnished, or to be done and furnished under contracts already made in respect to said building, or of contracts hereafter to be made therefor, and no contract shall hereafter be made, nor any moneys paid, on account thereof, unless such contracts shall be approved by the present architect of said building.'

"The legislators were careful then. They saw the end of the matter, and, in order to guard against any further abuses, they provided that no money should be expended except upon contracts already made, or on contracts to be made and approved by the architect of the building. The Legislature, it appears, had confidence in that gentleman, and believed that he would not wantonly squander the public money.

"In the year 1865 another appropriation was asked for, and the eternal work of *finishing* this Court-house went on. In the Session Laws of that year, pages 1252-1253, chapter 605, section 1, it was provided that the Board of Supervisors of said county (New York) are

'Empowered and required, as soon as conveniently may be after the passage of this act, to order and cause to be raised by tax * * * the following sums of money for the several purposes hereinafter specified: * * * New York County Court-house, construction of, three hundred thousand dollars. No portion of said moneys shall be used except in payment for materials furnished, or to be furnished, under contracts already made in respect to said Court-house, or of contracts hereafter to be made therefor, and no contract shall hereafter be made, nor any moneys paid on account thereof, unless such contracts shall be approved by the present architect of said Court-house, and no work shall be paid for except upon the approval of said architect.'

"Here, in 1864 and 1865, you find substantially the same provision. The only check upon this enormous expenditure of money was the approval of the architect.

"In 1866, it would seem that the completion of the building had gone backward instead of forward. Although three hundred thousand dollars was enough to complete it in 1865, in 1866 it required five hundred thousand dollars for the same purpose. It is provided in the Session Laws of 1866, page 1893, chapter 837, section 1:

"In addition to the several amounts authorized and required by existing laws to be raised by tax in the City and County of New York for the use of the State, and for defraying a portion of the contingent and other charges and expenses of said city and county, for the year one thousand eight hundred and sixty-six, the Board of Supervisors of said county are hereby empowered and required, as soon as

conveniently may be after the passage of this act, to order and cause to be raised by tax * * * the following sums of money for the several purposes hereinafter specified: * * * Court-house (new), construction of, five hundred thousand dollars.'

"It would seem now as if the Legislature had abandoned all idea of the Court-house ever being built, and therefore they place no restriction upon the expenditure of the money. No provision is made in that act as to how the expenditures are to be audited and paid. It is interesting to observe the way the annual appropriation increases. In 1865 the sum of three hundred thousand dollars is sufficient to complete the Court-house. In 1866 the additional sum of five hundred thousand dollars is necessary. In 1867 the sum of eight hundred thousand dollars is required to complete the building. It seemed that the longer this work progressed the more it required each year to finish it. There is a provision in the Laws of 1867, pages 1993-94, chapter 806, section 1, similar to the one that I have read. It provides for an appropriation, as follows:

"'Court-house (new), for *completion* of, eight hundred thousand dollars (\$800,000).'

"No provision was made—and it would have been a work of supererogation to make any—in regard to the manner in which the money was to be expended, or upon whose certificate payments were to be made. It was of no consequence whatever, for the Legislature evidently had in despair given up the whole subject. That amount was expended, and then, in 1868, it required eight hundred thousand dollars more. By this time the Legislature had discovered that unless some check were put upon this enormous expenditure the present generation would never see the work completed, and therefore, to save posterity from attempting such a

task, a limitation upon the expenditure was made in the year 1868. That statute uses the following language :

“‘For the *completion, fitting up, and furnishing* of the new Court-house, in the said county, (New York), now *near completion*, the Comptroller of the City of New York is hereby authorized and directed to raise the necessary money, not exceeding eight hundred thousand dollars.’

“Mark you, in this act the Legislature determined that under no circumstances should any more be appropriated. And you perceive this appropriation of eight hundred thousand dollars is not for the construction alone—not for the fitting up alone, but for the *completion, fitting up, and furnishing* of the new Court-house, now *near completion*.

“Here, gentlemen, is the source of much of our modern difficulty on this subject. Up to a certain time the money was to be expended under the approval of the architect. In later years the money was to be expended (as far as the particular tax levies were concerned) upon the approval of nobody in particular; but this act has the following provision :

“‘The money so raised shall be paid by the Comptroller on bills *audited and allowed by the Board of Supervisors of said county.*’

“The moment the subject got into the Supervisors’ hands it assumed an apparently perpetual, eternal condition of expenditures. When the bills were to be audited by the Board of Supervisors — among whom, or chief among whom, was William M. Tweed—it would appear by these various statutes that no progress was made whatever towards ending this expenditure.

“In 1869, according to the statute (pages 2113 and 2116, chapter 875, section 1), another provision of six hundred thousand dollars (\$600,000) was made. And

what was that for? Precisely the same thing as the year before. That was 'for the *completion, fitting up, and furnishing* of the new Court-house in said county, now *near* completion, six hundred thousand dollars (\$600,000).' The year before, when it was near completion, it required eight hundred thousand dollars (\$800,000). In the year 1869 it required six hundred thousand dollars (\$600,000) to complete and furnish. The sum so raised was to be audited by the Board of Supervisors. In the tax levies of 1868 and 1869 are contained the same provisions. Then, again, in 1870, when the Legislature met, the building was no nearer completion. According to the Session Laws of that year (chapter 382, section 1), it was provided :

“‘In addition to the several amounts authorized and required by existing laws to be raised by tax in the City and County of New York, * * * the Board of Supervisors of said county are hereby empowered and required, as soon as conveniently may be after the passage of this act, to order and cause to be raised by tax * * * the following sums,’ etc.

“Now a flood of light breaks upon us. Great hope is expressed here :

“‘Section 11. To provide for the *final* completion of the new County Court-house in New York * * * the sum * * * of six hundred thousand dollars (\$600,000).

“Now, gentlemen, starting in the year 1858 with a provision that we shall have a Court-house which, with all its furnishing and finishing, shall cost two hundred and fifty thousand dollars, and no more, we have arrived at the end of 1870 with annual appropriations running from a million to as low as three hundred thousand dollars; and, with one exception, there has been an appropriation every year. In the year 1863 no appropriation was made, there having been an appropriation of a mill-

ion of dollars the year before. In 1870 it was provided that :

“‘The money so raised shall be paid by the *Comptroller on vouchers approved by the commissioners herein authorized, and to be filed in his office.*’

“Now, gentlemen, you would have supposed that we had reached the *final completion* by this time ; but no such good fortune was in store for us.

“In the laws of 1871 (pages 1268 and 1273) there is a provision that :

“‘The Board of Supervisors of the County of New York are authorized and required to raise by tax * * * Section 7 (page 1273), for the completion of the New York County Court-house [it had been completed three years before ; it had been *finally* completed once before ; now it is merely for the completion of the New York County Court-house] the sum of seven hundred and fifty thousand dollars (\$750,000).’

“This is in 1871.

“‘Under the direction and supervision of the commissioners appointed under the provisions of section 11, chapter three hundred and eighty-two, of the laws of eighteen hundred and seventy.’

“That is to say, after this matter had gone on so long and the charter had been passed, it was then taken out of the hands of the Board of Supervisors, and a special commission created to finish the Court-house. And who had the appointment of the commissioners ? Now the work was to be done in earnest. A charter had been passed conferring imperial powers upon our Mayor. A commission had been created, and then the work was to be done, and the law prohibited the expenditure of another dollar for that purpose in addition to the amount appropriated. Who was the fortunate officer to appoint the

commissioners to actually complete the Court-house? That man was A. Oakey Hall, Mayor of the City of New York. The power was conferred upon him to appoint, I think, five commissioners for that purpose. The seven hundred and fifty thousand dollars (\$750,000) provided for the completion of the new Court-house in the City of New York, was to be paid on the certificate of those commissioners. He appointed them. The duty was cast upon him by law to see that they faithfully performed their duty. He had the supervision of them; and he had a fund which was more than ample for the particular purpose for which it was appropriated.

"I have shown you that the Legislature in different years has appropriated over six millions of dollars for the construction, completion, and furnishing of our County Court-house. The money has been raised upon bonds. The interest which we have paid is over one million eight hundred thousand dollars. In round numbers, the Court-house has already cost over eight millions of dollars, probably four times as much as it ought to cost when properly completed and furnished.

"You would suppose that was enough, and that a Mayor who himself was chargeable with a knowledge of these various statutes—and, if opportunity should be afforded, I would like, when the proper time comes, to ask him whether he drew any of them—you would suppose that a Mayor cognizant of these various laws, who was aware that six million two hundred thousand dollars had been appropriated for this Court-house, which, on no conceivable estimate, with all its furnishings and finishings, can be worth three million dollars, would use some caution when bills were placed before him to audit, or when warrants were placed before him to be signed, for any further expenditure on the subject of this Court-house.

"There has been paid, in addition to these enormous

sums to which I called your attention—what amount do you think? I called your attention to six millions and upwards appropriated by the Legislature for this specific purpose, and yet, gentlemen, extraordinary as the announcement may be, in addition to these enormous amounts, according to the actual figures, there was paid, in the years 1869 and 1870, *about six millions of dollars upon warrants signed by the Mayor and Comptroller.*

“Let us stop right here and figure up, as far as practicable, the cost, up to the present time, of this far-famed building—the New York County Court-house.

“I invite your attention to the following:

Statement showing Appropriations of the New York Legislature, from 1861 to 1871, for the New York County Court-house; also, Amount of Interest payable thereon. (Time calculated from July 1, 1861, to July 1, 1871.) Also, amounts paid in excess of Legislative Appropriations.

<i>Years.</i>	<i>Amounts Appropriated.</i>	<i>Interest, 7 per cent.</i>	<i>Amount of Interest.</i>
1861.....	\$50,000	10 years	\$35,000
1862.....	1,000,000	9 “	630,000
1864.....	800,000	7 “	392,000
1865.....	300,000	6 “	126,000
1866.....	500,000	5 “	175,000
1867.....	800,000	4 “	224,000
1868.....	800,000	3 “	168,000
1869.....	600,000	2 “	84,000
1870.....	600,000	1 “	42,000
1871.....	750,000		
	<u>\$6,200,000</u>		<u>\$1,876,000</u>
Total Legislative appropriations from 1861 to 1871.....			\$6,200,000
Total interest on Legislative appropriations to July 1, 1871.....			<u>1,876,000</u>
Legislative appropriations and interest....			\$8,076,000
In 1869 and 1870, amount paid in excess of Legislative appropriations.....			<u>6,336,004</u>
Total cost up to July 1, 1871.....			<u>\$14,412,004</u>

“At the present time this County Court-house, not worth three millions of dollars (worth but little, if any, over two millions), with all its furniture, has cost the city upward of *fourteen millions of dollars!* We are actually paying yearly as interest a sum greater than the Court-house would have cost had it been completed, as was intended, within a reasonable time after its commencement. One million dollars a year interest, in round numbers, we are paying for this Court-house; and if we go on and pay this interest for eleven or twelve years—it is probable that we shall continue to pay it for a much longer period—the whole cost, principal and interest, will be not less than twenty-five millions of dollars! At all events, the interest is a most important item. Can you wonder that your taxes are so large when you have to pay such enormous sums and get so little in return?

[Mr. Clinton then proceeded to call attention to the duties of the Mayor, enjoined upon him by law; also to facts showing, as he claimed, that the defendant must have known that the claim set forth in the indictment was fraudulent. After speaking at great length upon these points, Mr. Clinton concluded as follows:]

“Gentlemen, on behalf of the prosecution we ask you to render a verdict in accordance with the law and the evidence. With entire confidence we call on you to discharge your duty fairly, impartially, and fearlessly between the people and the defendant.

“In times like these, when corruption, like the pall of death, overhangs our city; when fraud, brazen with success, defies a long-suffering, patient, plundered community; when larcenies are conducted on a scale of imperial splendor; when forgeries nestle in the bosom of justice; when amateur burglars convert the very temple of law into a theatre for the exercise of their skill and daring; when the signs of the times are read by the

light of burning records; when names of high officials are encircled with a halo of infamy, our only hope is in an upright, independent judiciary, and an honest, fearless jury. The eyes of the people of this great metropolis—the first city in America—are upon you. The attention of the people of this State is riveted upon you. This whole nation is anxiously awaiting your verdict. The deep interest of not alone this nation, but of every civilized nation on the globe, in the result of this trial must admonish you of the importance of the rendition of a *true* verdict; a verdict which will show to the world that you have, indeed, been true to the great public interests involved in this case—true to the law, whose ministers you are—true to the cause of public justice committed to your keeping—true to yourselves. To each of you, I say,

“ . . . To thine own self be true;
And it must follow, as the night the day,
Thou canst not then be false to any man,”

or to the community in which you live.”

CHAPTER XXVIII

CASE OF A. OAKLEY HALL—(CONTINUED)

Testimony Given.—Startling and Dramatic Incidents Connected with the Trial.—The Result of the Trial.

At the close of Mr. Clinton's address the Court adjourned until Monday, the 4th of March, at which time the trial proceeded, and was continued from day to day until and including Friday, the 8th of March, when it was adjourned until the following Monday.

Richard A. Storrs was the first witness called for the prosecution. He testified that he was an assistant in the Comptroller's office, and had been there since the year 1857. He stated that he caused a search to be made in the Comptroller's office, and the paper he had in his hand was given to him the preceding summer by Mr. Connolly, who was then Comptroller. He testified that the paper was in the handwriting of Mayor Hall, and that the signatures thereto were those of Mayor Hall, Mr. Tweed, Commissioner of Public Works, and Comptroller Connolly. The paper was read in evidence, and was as follows :

“COMPTROLLER'S OFFICE, *5th May*, 1870.

“The undersigned meet as a Commission under and by virtue of section 4, chapter 382, of the laws of 1870. On motion of the Mayor it is ‘Resolved, That the County Auditor collect from the appropriate committees of the Board of Supervisors all bills and liabilities against the county incurred prior to April 26, 1870, and the amounts now due thereon, and that the evidence of the same be the authori-

zation of the same, by the said board or its appropriate committees, on the certificate of the clerk or president, and that thereupon the said County Auditor annex the voucher and the appropriate blanks for our signature, and action, as directed by the section aforesaid, and payment.

“A. OAKEY HALL, *Mayor*.

“WILLIAM M. TWEED, *Present President
Board of Supervisors*.

“RICHARD B. CONNOLLY, *Comptroller*.”

The witness testified that he had no knowledge of any meeting of the commission referred to in this paper or of the gentlemen composing it. Upon being asked whether he knew of any record in the Comptroller's office having any reference to the meetings or business of this commission, the witness stated that he knew of a package of papers representing the county liabilities, which were kept in the County Auditor's office; and that about the 11th of September, 1870, these papers were stolen, and have not since been recovered. He at once apprised the Comptroller of the theft, and they went to the desk where the papers were kept. He said: “The pigeon-holes where those vouchers were kept were empty; the lock had been forced and a portion of the glass was broken.” The vouchers relating to the Board of Audit were stolen. Those vouchers included the claims of A. J. Garvey. The witness knew of the existence of these vouchers of claims of A. J. Garvey before the robbery. Subsequent to the robbery he knew of no such vouchers, though he had made a search. He stated that he was able to distinguish the class of claims that passed through the Board of Audit and other county claims in general that were presented. The witness stated the routine in the Comptroller's office in respect to the auditing and payment of claims for county liabilities.

Stephen C. Lynes was the next witness called for the

prosecution. He testified that he was recently the county book-keeper in the office of the Comptroller; that he was engaged there from 1858 to 1871; that he was appointed County Auditor by the Comptroller in May, 1870, and remained in that position until September, 1871. The witness stated the routine business in the Comptroller's office with respect to claims presented to the Board of Audit, consisting of Messrs. Hall, Tweed, and Connolly. He said when bills were presented, Tweed's name, as chairman, was written across the page in his own handwriting. The witness testified to the robbery of the vouchers in September, 1871.

William S. Copeland was next called by the prosecution. He stated that he was employed in the Comptroller's office in January, 1870, and remained there until March, 1871. He was engaged in the county bureau to assist Mr. Lynes, the book-keeper. The prosecution offered in evidence the following warrant:

County Liabilities. Register. J. Lynes, County Book-keeper.	}	To the County Treasurer of New York, at the Broadway National Bank. \$41,563.42-100. No. 2507. New York, June 6, 1870. Pay A. J. Garvey, or order, forty-one thousand five hundred and sixty-three 42-100 dollars for labor and materials, New York County Court-house. December 16, 1869.
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Countersigned. { A. OAKEY HALL, *Mayor*.
 { RICHARD B. CONNOLLY, *Comptroller*.
 { J. B. YOUNG, *Clerk Board of Supervisors*.

After protracted argument on the part of the defence the Court admitted this warrant in evidence.

It was not known to the defendant, or any of the Tweed Ring, that Andrew J. Garvey, who was deeply implicated in the Ring frauds, was ready to turn State's evidence. It was believed that he was in Europe, whith-

er he had fled soon after the arrest and prosecution of those concerned in the Ring, frauds commenced. He had been in New York City a considerable time, ready to testify when wanted. On Thursday afternoon, the prosecution being ready for his testimony, determined to put him on the stand. In what way to introduce him into court, so as to avoid wild excitement and a tumultuous crowd, was a subject for consideration. Mr. Clinton planned the mode of doing it. It was arranged that Garvey should quietly attend in the clerk's office without removing the disguise which he wore; and, at the conclusion of Mr. Copeland's evidence (who testified in respect to routine matters in the Comptroller's office, entirely uninteresting, during which most of the audience left), upon being called as a witness, he should remove his disguise, walk into the court-room, and take his place on the witness-stand. This programme was carried out. Had Garvey risen from the dead, and appeared in his grave-clothes, he could not have carried greater consternation into the ranks of the defence. The effect upon defendant's different Counsel was peculiar and extraordinary. One looked as though he would die in an apoplectic fit; another became livid, etc. The whole scene was extraordinary. The Clerk of the Court happened to be out, so that Judge Daly had to administer the oath to the witness. He attempted it and stumbled, and failed to get it right; he started afresh and stumbled again; his excitement and lack of self-possession were remarkable. Finally, he succeeded in getting the form of the oath correct, and the witness was duly sworn. Poor Garvey in the meantime sat perched up in the witness-chair, facing his old comrades, tremulous with excitement, evidently making desperate efforts to maintain his self-possession. Finally, the suspense ended, and the direct-examination of the witness by Mr. Tremain began. The court-room, which was almost empty when

Garvey entered, by this time was filled and crowded to overflowing, the news having circulated with the speed of lightning through the City Hall and its vicinity that "Garvey had come."

The following account of the scene appeared in the New York *Tribune* of March 8, 1872:

"GARVEY AN INFORMER

"THE 'RING' PLASTERER TURNS STATE'S EVIDENCE

"His Sudden and Startling Production in Court to Testify against Mayor Hall.—A Dramatic Scene.—The Mayor Livid with Rage, or Fright.—The Counsel for the Defence Thrown into a State of Consternation.—Garvey to Confess the Whole Conspiracy.—Ingersoll also Ready to Turn Informer.—Excitement in the City and at the Clubs.

"The defection of Connolly, the accession of Green to the Comptrollership, the overwhelming defeat of Tammany at the polls, the arrest of Tweed, and the indictment of Hall and Sweeny * * * were all exciting events in the great drama of the Ring's downfall; but no one of these incidents was so startling as the occurrence of yesterday, when, coming from the clerk's apartment, in which he had been concealed, as from a tomb in which he had been interred, Andrew J. Garvey, at the Attorney-General's call, walked into the court-room and took the witness stand, to testify against Mayor Hall. Not merely were the people in the court-room surprised, and the accused and his Counsel amazed at the apparition of the returned plasterer, but consternation fell upon the Ring and its adherents; and the whole city was convulsed with the varied emotions naturally created by the news that one of the conspirators had returned to convict the others. No more dramatic incident ever occurred in a New York court-room. If Judge Daly had read his own death-warrant from the bench, a more profound sensation of astonishment could not have agitated the court-room than when Garvey took the witness-stand.

"The proceedings of the day, up to the moment he was called, had been uninteresting and tiresome to an unusual

degree. The audience had grown so small that it was no longer difficult, as in former days, for the reporters and Counsel to force their passage into the space set apart for them. The reporters had grown careless, and even the presence of Copeland, the witness upon whose affidavit the action against the Mayor and others was largely based, did not relieve the tedium of the trial, for the reason that all the morning had been taken up with never-ceasing objections and exhaustive arguments. The attack by the prosecution in the production of the testimony of Copeland was confidently sustained by the defence, who doubtless considered that half the battle had been fought when this was in, but they had no conception of the unexpected shot that was yet in reserve to disconcert them. After the recess, and at the conclusion of the argument, Mr. Copeland was recalled for a moment, but before he gave any testimony the prosecution seemed to change purpose, and the witness was dismissed.

“A short whispered consultation was held between the Counsel for the people, not a word of which could be gathered or overheard. But it resulted in Mr. Peckham’s calling out in a loud voice the name ‘Andrew J. Garvey.’

“It was instantly concluded by the crowd that the acting Attorney-General had made an error, a mere slip of the tongue, and a slight laugh, half scornful, half incredulous, followed. But when the lawyer turned and fixed his eye upon the closed door which leads to the Judge’s private room, all turned and gazed inquiringly in the same direction, while smiles expressed the incredulity of the crowd. A Court official suddenly darted into the private room, and while the name of Garvey sounded a second time on Mr. Peckham’s lips, the veritable Andy Garvey walked rapidly through the door, up the steps leading to the bench, disappearing for a moment behind the broad sounding-board in the rear of the Judge’s seat, reappeared beside the witness-stand, and grasped the Bible as he waited with head uncovered to receive the oath.

“The effect of this *coup* on the part of the prosecution

may be imagined, it cannot be described. A buzz of astonishment filled the room. Many persons involuntarily rose in their seats and stared at the new-comer as if he were a ghost come from the grave to fright them. Those who were not familiar with his features turned inquiringly to others, some of whom said, 'It is his brother.' A number of gentlemen prominent in matters pertaining to the City Hall and new Court-house were sitting inside the bar and standing about the clerk's desk, and they were as greatly surprised as others. A large number of prominent lawyers were also present, interested spectators of the exciting scene. The surprise was complete and undoubted, and during the moment that Garvey stood quietly waiting for the oath, the room was a Babel of whispers.

"The faces of the different Counsel were studies of character never to be forgotten. Mr. Peckham's imperturbable features betrayed no tokens of the satisfaction he must have felt at the success of his difficult task. Mr. Tremain and Mr. Clinton made no efforts to hide their complacency, and evidently enjoyed the discomfiture which this thunder-bolt out of a clear sky had occasioned. The faces of the half-dozen Counsel grouped about the Mayor were even more instructive, and exhibited a greater variety of expression. Ira Shafer and Mr. Smith were decidedly demoralized, and showed it. Mr. Burrill stepped about with nervous quickness, and laughed contemptuously, but with a forced and hollow laugh. Mr. Stoughton, dignified and imposing, appeared indignant, and like a man who, driven into a corner, is bound to fight the harder; while Mr. Vanderpoel simply smiled.

"As to Mayor Hall, his countenance, while tolerably composed, nevertheless bore a look of chagrin and serious disappointment, and he was livid—with rage or fear. The blow, in its very unexpectedness, was hard to bear, and the accused gathered his defenders about him at once in earnest conference. It was evident that none of them had looked for evidence of this sort to prove the existence of the lost voucher, and to establish, perhaps, even more.

“Meanwhile the news spread rapidly that ‘Garvey was on the stand’; the room quickly filled, and numbers stood outside the doors in vain endeavors to gain entrance and a sight of the almost mythological personage, whose name had been in everybody’s mouth scarcely less than Tweed’s. As Garvey stood at the Judge’s left hand, in full view of the whole Court, those who saw him before his disappearance from New York imagined his hair grayer and his features sharper than usual, as though the recollections of crime and the vain effort to fly from conscience as from justice had changed his appearance, manner, and nature alike. His manner certainly was agitated and his motions nervous and frightened. His voice slightly quivered as he replied to the questions of Mr. Tremain, and he was painfully polite, even to servility, as guilty men in such embarrassing positions are apt to be.

“Whatever hope the defence may have clung to at the commencement of the testimony seemed to have been dissipated at the appearance of this new witness, whom all had supposed out of the country. The dangerous nature of the testimony which he might give was instantly suggested by the first questions of the Counsel, Mr. Tremain, who conducted the examination; and it was not many minutes before the defence rallied and came forward with their objections and arguments. It was hardly in the nature of men constituted as the Counsel for the defence to rest long from the fight, and there consequently followed a wordy warfare of the most remarkable and exciting character.”

The following account of the scene was given by the New York *World* of March 8, 1872:

“The reform movement has been noted for dramatic episodes, but nothing of the kind that has yet taken place can compare with the scene in the Court of Common Pleas yesterday, when the long-absent and oft-indicted Andy Garvey appeared *in propria persona* before the assembled audience. Up to the middle of the forenoon the trial had

dragged its slow length along with tedious lack of interest, and the numerous and learned Counsel on either side wasted their strength and consumed the hours in legal fence and skilful subtleties, calculated rather to show their knowledge of technicalities than to help onward the proceedings. A number of additional documents were offered in evidence, and this led to long wrangles as to their admissibility.

"Suddenly, at ten minutes to three o'clock, the crier, at a hint from the Counsel for the prosecution, startled every one present by calling out the name of Andrew J. Garvey, who was summoned to appear as a witness. At once all other sounds subsided, and there was a hush of expectation throughout the vast crowd present. Every eye was strained and every neck stretched, though no one for a moment imagined that any living person would respond to the discordant summons. But to the amazement of every one, some one did appear. The large door leading into the clerk's private room at one side turned on its hinges, and through it walked with rapid but bold tread no less a person than Andy Garvey himself, who passed through the room without hesitation and took his seat at the witness stand at the left hand of the Judge. The effect of his appearance was like that of a thunder-clap out of a cloudless sky. An electric thrill ran through the crowd, and a murmur of surprise passed from mouth to mouth. The Counsel for the prosecution were elated, while their opponents were dumfounded, and consulted with their heads close together. The only man in the room who retained his ordinary composure was the defendant himself. Mr. Hall was engaged in writing when Garvey entered ; he looked up a moment and then continued the work in hand without being in the least disturbed by the sudden and rather dramatic appearance of the man upon whose testimony Counsel for the prosecution were relying for the ultimate triumph of their cause."

After answering a few preliminary questions, Garvey was shown a warrant for the payment of money which

had previously been put in evidence. He testified that his name written on the back of it was his signature; and that at the time he received the warrant there were other papers with it.

The following is an extract from his evidence given in the report of the proceedings in the New York *Tribune*, March 8, 1872:

“*Question.* ‘These papers in connection with this account and the warrant, did they come together?’

“*Answer.* ‘The papers, I believe, belonged to the bill, and, with the warrant, were all pinned together; the warrant was pinned on, and I think the others were mucilaged together.’

“*Q.* ‘The warrant was separated and you got it?’

“*A.* ‘Yes, sir.’

“*Q.* ‘And you left the balance of the papers with Woodward?’

“*A.* ‘Yes, sir.’

“*Q.* ‘Was this account a just and honest account?’

“Instantly Mr. Burrill for the defence was on his feet, and the fight of the defence was resumed.

“*Mr. Burrill.* ‘We object. What is the object of that?’

“*Mr. Tremain.* ‘Perhaps I ought, out of frankness to the gentlemen on the other side, to state the object of the question. What I want to show by this question is, that this entire account, with the exception of perhaps thirty-five per cent. of it, was wholly fictitious, and had no foundation whatever in justice, in honesty, and in fact.’”

Mr. Stoughton, on behalf of the defence, entered into an argument against the admissibility of this question which occupied all the rest of the day, and a large part of the following day (Friday). Without hearing any argument on behalf of the prosecution, Judge Daly decided that the question was admissible.

The *Tribune* report (March 9, 1872), after giving the argument of Mr. Stoughton, proceeds as follows:

"Judge Daly, at the conclusion of Mr. Stoughton's remarks, said he should rule for the present that the witness might be asked all that he knows respecting this claim—on what it is founded, its presentation, and its history down to the time of its payment. He did not think it proper to give his reasons for such ruling then, but would decide for the present in that way. Mr. Smith desired the Court to note their exception, and the prosecution then called A. J. Garvey again to the stand.

* * * * *

"*Question.* 'How was it made up—on what foundation, if any, was it made up?'

"*Answer.* 'In the latter part of April Woodward was Deputy Clerk of the Board of Supervisors, and on the 25th of April, 1870, James W. Ingersoll stated—'

"*Mr. Smith.* 'One moment, stop there.'

"*Judge Daly.* 'You cannot do what?'

"*Witness.* 'I don't know how I can answer that question without telling what Ingersoll stated.'

"*Mr. Tremain.* 'In consequence of what they said, you did something?'

"*Mr. Stoughton.* 'Or after what they said, rather.'

"*Witness.* 'I had finished all the plastering in the Court-house from May, 1869, up to the present moment—all that is done.'

"*Q.* 'You mean up to the time of this conversation? I want to confine you to the time before this account was presented, in June, 1870. Go on and state what was done before that time when this account was presented.'

"*A.* 'It was necessary for me to finish the plastering, labor, and materials, and finish the repairs and alterations of the Court-house for \$110,900.'

"*Q.* 'At what time?'

"*A.* 'The 20th of April, 1870. I went to get that amount which was actually due for work done and in progress at that moment :

On account of buildings.....	\$78,760
Armories and drill rooms.....	75,000

That was money that I wanted to pay me for labor and materials and expenses, and allow me my profits; besides, there were due to me unpaid *by outside parties* \$126,000, *that I was expecting to cover up in my bills; there was \$50,000 that was cashed to Mr. Tweed to Albany for the Legislature.*

"*Mr. Burrill.* 'We object.'

"Mr. Garvey said he would have to go into that question in order to fix the amount of this one bill.

"*Mr. Burrill.* 'Can't he state how much is the overcharge in this bill?'

"*Mr. Tremain.* 'This bill is part and parcel of the system of bills, all introduced under one arrangement, and it is utterly impossible to take a single bill and separate it from its compeers.'

"*Judge Daly* (to Mr. Garvey). 'Is that so?'

"*Mr. Garvey.* 'It is, to separate, to a certain extent; this arrangement of ours was nearly all concocted and made up before I made out my bills at all.'

* * * * *

"*Q.* 'Explain the nature of this bill as far as you can without entering into the other matters?'

"*A.* 'Well, the amount I claimed for work on the Court-house, in the armory buildings and drill-rooms was two hundred and sixty-four thousand six hundred and sixty dollars (\$264,660), work done and in progress; *and there was due me for other purposes that I was expected to square in my bills, one hundred and twenty-six thousand dollars (\$126,000); then I added five thousand dollars (\$5000) for myself for expenses of the fall—political expenses—my own assessments.*'

"Mr. Burrill interrupted the witness.

"*Mr. Clinton.* 'Objections must be addressed to the Court and not to the witness.'

"*Witness.* 'That was the money I expected to get paid at the bank.'

"*Mr. Burrill.* 'The witness does not seem to follow your Honor's instructions.'

"*Mr. Tremain.* 'Yes, he does.'

"*Mr. Burrill.* 'He seems rather willing to indulge in expressions that have nothing to do with the case. All we ask is that in eliciting evidence which might be material, the Court does not allow evidence to be introduced of other bills which are not the subject of this indictment, and of bills other than this one now before the Court.'

"*Judge Daly.* 'Mr. Garvey, a proper inquiry can be made into this bill for \$41,000 as to how it originated. You can make an explanation of that without any further matter, except so far as it is essential to explain that. Keep as much as possible out of any other matter.'

"*Mr. Burrill.* 'Allow me a suggestion. He has got the bill of \$41,000 ; can't he state how much of that bill is honest or not ?'

"*Judge Daly.* 'I can only state the limit of the inquiry.'

"*Q.* 'Now follow the suggestion of the Court, Mr. Garvey.'

"*A.* 'I had \$395,660 I claimed to be paid, and I made up my bills with a view—'

"*Mr. Burrill.* 'We object to any other bills.'

"*Witness.* 'I made out this bill for forty-one thousand dollars (\$41,000) with a view of paying a certain proportion ; *I received thirty-five per cent. of the bill ;* the interest had nothing to do with it ; I took the net bill and twenty-five per cent. of that in payment of myself and my work ; I actually received a few hundred dollars more than my estimate—\$395,660. I received, I think, three hundred and ninety-seven thousand dollars (\$397,000) ; the accounts were made out on that basis, so that I got back my money and paid for the bills I had advanced ; *I received but thirty-five per cent. of the net bill without the interest.'*

"*Q.* 'And this was one of the bills thus made out ?'

"*A.* 'That is a pretty fair copy of that bill.'

* * * * *

"*'There was \$50,000 in cash, said to be for matters in connection with the Legislature, and which was taken to Albany to Mr. William M. Tweed by my brother ; there was \$60,000 for working expenses in Greenwich, Connecticut, in 1869 and*

1870, for *William M. Tweed*, work by his order at *Coscob*; two amounts, \$60,000, for a friend; \$13,000 for work done in *Norwalk* for *Mr. Woodward*; \$3000 for plastering two houses for — in *Fifty-fifth Street*; I gave *Mr. —* a receipt for it in the room down-stairs, but I never presented him a bill; \$5000 for myself; I thus anticipated my expenses for the fall campaign.'

"Q. 'Your own assessment?'

"A. 'Yes.'

"Q. 'There were two houses for —, one for *Tweed*, and one for a friend?'

"A. 'Yes, sir.'

* * * * *

"Q. 'Now, then, take this particular account, and give a history of it from the time you presented it until you finally received the warrant. State all you know about it, and what took place in its passage.'

"A. 'As near as I can judge, that account was rendered—'

"Mr. Burrill objected, as witness was not shown to speak positively of this particular account.

"Mr. Tremain. 'Is that any reason why the whole question should not be answered?'

"Judge Daly. 'His answer must be given, and you can cross-examine upon it.'

"Mr. Tremain. 'There must be some limit to these objections.'

"Mr. Burrill. 'I insist we ought to be allowed to object to every question.'

"Judge Daly. 'Mr. Garvey, speak, as far as you can, of everything you know.'

"Question repeated.

"A. 'I think about the latter part of May, with probably three other bills—'

"Mr. Stoughton. 'Speak of this bill.'

"Judge Daly. 'You have no right to interrupt the witness.'

"Mr. Stoughton. 'You confine him to answer in respect

to this bill—if I am right in saying that I had a right to stop him when he undertook to speak about other bills.’

“*Judge Daly.* ‘He has not spoken of this except in connection with other bills.’

“*Mr. Stoughton.* ‘He can’t speak of this bill without speaking of other bills.’

“*Witness.* ‘I did not put this bill in alone.’

“Question repeated.

“*A.* ‘I gave a bill, I think, with three others—’

“*Mr. Burrill.* ‘The witness ought to be restrained within proper limits.’

“*Judge Daly.* ‘Mr. Garvey, as far as you can, state what you did in reference to this particular bill.’

“*Q.* ‘What did you do in reference to this particular bill?’

“*A.* ‘I gave it, with three others, to Mr. Woodward, in the office of the Board of Supervisors, and he looked at them.’

“*Mr. Burrill.* ‘The witness has said that he has no recollection of this particular bill.’

“*Mr. Tremain.* ‘He did not.’

“*Mr. Burrill.* ‘He did.’

“*Mr. Tremain* (to the witness). ‘Go on, sir.’

“*Witness.* ‘He took them, and just after glancing at them he took them over to Mr. Watson’s office.’

“*Q.* ‘Where was he?’

“*A.* ‘In the Supervisors’ office.’

“*Q.* ‘Did he have a particular desk there?’

“*A.* ‘He took it over there.’

“*Mr. Stoughton.* ‘Did you go with him?’

“*A.* ‘Yes, I did.’

“*Mr. Tremain.* ‘I submit that these continued interruptions are improper.’

“*Witness.* ‘He took them over to Watson’s office and left them there.’

“*Q.* ‘Watson was the Auditor?’

“*A.* ‘Yes, sir.’

“*Q.* ‘How long had he acted as such?’

"A. 'I could not tell you that—a great many years.'

"Q. 'Where was his office?'

"A. 'In the Comptroller's office, adjoining Mr. Connolly's room.'

"Q. 'Did the Auditor have his office there?'

"A. 'Yes, sir. He had an office partitioned off there, with a nice walnut partition.'

"Q. 'You say you went there with him. What did he do with the accounts?'

"A. 'He just handed them to Watson.'

"Q. 'What was the next thing you know of them?'

"A. 'After June he found me and took me into a room down-stairs.'

"Q. 'State what was done between you and him.'

"A. 'We went into the room, closed the door after us, went over into a private corner, and I gave him the check.'

* * * * *

"*Witness.* 'I gave him a check for \$110,135.13.'

"Q. 'To whom?'

"A. 'To Woodward; my own check on the Broadway Bank.'

"Q. 'Was that check paid at the bank?'

"A. 'Yes, sir. I went over there and deposited the warrants.'

"Q. 'Your bank-book has been written up since then?'

"A. 'Yes, sir.'

"Q. 'Including that check?'

"A. 'Yes, sir.'

"*Mr. Tremain.* 'Now, I will bring up the other question that I waived at the time.'

"*Mr. Burrill.* 'I ask your Honor to strike out all that this witness has said in his last answers, as to the giving of the check to Woodward.'

"*Judge Daly.* 'I will note your exception to the testimony; what is the particular portion you wish to strike out?'

"*Mr. Burrill.* 'My motion is to strike out everything on the subject of giving Woodward the check, because after

the warrant was signed it was not connected with anything in this case.'

"*Judge Daly* (to Mr. Tremain). 'What do you propose to show with regard to the evidence after the Mayor had signed the warrant?'

"*Mr. Tremain*. 'I had hoped at this stage of the case that I should not be required to answer that question, but that the evidence would be received. I understand that the testimony, pure and simple, is evidence in this case, whether it appear for or against the prosecution, on the principle that whatever formed part of the *res gestæ* of the case was admissible, and that the Court had ruled that from the time the accused was prosecuted until the warrant should be received, all matters relating to it should be given in evidence. Now if the person who had this warrant refused to deliver it until the witness gave him \$100,000, this is connected with the delivery of the warrant prior to its payment, which is alleged in the indictment as one of the statements in the indictment pointing out the *modus operandi* by which this warrant was signed.'

"*Judge Daly*. 'I propose to admit evidence down to the time of the delivery of the warrant and to exclude all from the time of the Mayor's final act, which was signing the warrant, unless that question has some connection with something else, to which I do not, at present, see its pertinency.'

"*Mr. Tremain*. 'I will waive the question and proceed to offer in evidence his account (the bill of Garvey), as I wish to ask a few questions relating to it.'

"Mr. Tremain then offered in evidence the account of Mr. Garvey, the certificate of audit, the Comptroller's order on the Auditor to draw the warrant, and the receipt for the warrant."

Garvey testified that he made no affidavit in respect to the correctness of his claim.

Garvey further testified as follows:

"Q. 'Before you presented the account in question, did

you receive from Woodward a memorandum in writing, giving you the subject-matter of the account, together with the amount of it and its date?"

"A. 'Yes, sir; on a piece of paper.'

* * * * *

"Q. 'Did you receive these memoranda from Woodward, as to the amount of the account, its date, and the substance of it?'

"A. 'I made the bills out in accordance with the memoranda given me by Woodward under the heading and the dates.'

"Q. 'He gave you also a heading?'

"A. 'The title of the account; he said: "Make your bills for such an account on the Court-house dated prior"—such a date.'

"Mr. Burrill. 'I understand you to say you made out the bill as you were told?'

"A. 'Yes, sir.'

"Mr. Tremain. 'Is there any portion of this account that you can point out that you can identify as being embraced in the memoranda given you by Woodward—whether it was printed?'

"A. 'Yes, sir; the sum total.'

"Q. 'What else?'

"A. 'The designation of the bill; the cost against the Court-house.'

"Q. 'And the date?'

"A. 'That is approximating; he said prior—such a date.'"

The above is the substance of the testimony given by Garvey on Thursday and Friday, at the close of which last-mentioned day the Court adjourned until Monday morning, March 11th, at which time the Court convened to proceed with the trial. Great was the surprise of all present when, by the direction of Judge Daly, the Clerk of the Court read the following certificate in respect to Mr. Clark, the foreman of the jury:

“JUDGE DALY :

“DEAR SIR,—I am attending Mr. Matthias Clark, of No. 525 Greenwich Street, who has been suffering from nervous prostration since Friday last, and will be unable to do duty as juror for several days to come. Mr. Clark suffered from an attack of paralysis about two years ago, and as I find that a continuance of this kind of service may induce a second attack, I would earnestly recommend that he be entirely relieved.

“Respectfully,

“J. W. WRIGHT, M.D.,

“*March 11, 1872.*”

“No. 8 Charlton Street.

The Court adjourned the trial until the following Friday, thinking it was barely possible that Mr. Clark by that time might be in a condition to resume his duties as a juror. On the previous Thursday, as soon as Garvey had answered a few preliminary questions upon the witness stand, Counsel for the defence began to make and argue at great length objections to questions put to the witness. This course was pursued by Counsel for the defence down to the time of adjournment of the Court on Friday afternoon. These arguments, which should have taken but a few minutes, occupied hours. When Counsel for the prosecution answered them, they required but a few minutes. Still the Counsel for the defence continued to make objections and occupied the greater part of the time of the Court in arguing them. It seemed to be their idea to block the proceedings of the Court with talk—endless talk. Had Mr. Clinton known that Mr. Clark had previously been afflicted with a stroke of paralysis, he would not have permitted him to go on the jury, even though it had been necessary to challenge him peremptorily. Mr. Clark had not vitality sufficient to withstand the effect of the talk of Counsel for defence. It rasped his nerves, and speedily un-

dermined his vitality. He could sleep but little nights. The talk of the defendant's Counsel haunted him; when asleep he repeated more or less of it. On Tuesday, the 12th of March, he died. Of course, the death of the juror Clark broke up the trial, and the remaining eleven jurors were discharged.

In respect to the criminal trials against those who were members of, or affiliated with, the Tweed Ring, it was understood that Mr. Clinton should take charge of impanelling the juries, of investigating their antecedents and associations, and ascertaining their qualifications and fitness to serve, as he alone of the Counsel for the prosecution had the requisite knowledge of political affairs in the City of New York to enable him to perform that duty satisfactorily. After the trial of Mayor Hall ended as above stated, a new indictment was found by the Grand Jury against him and Tweed and Comptroller Connolly, charging them with a large number of offences in failing, as members of the Board of Audit, properly to audit claims. This was known as the "Omnibus" indictment. Of course this indictment superseded the former one against Mayor Hall.

Afterwards and on the 23d day of October, 1872, Mr. Clinton was in Court to hear a decision upon a motion made on behalf of Tweed to reduce his bail. Mayor Hall was present and interposed his plea of "Not Guilty" to the new indictment; and at the time of doing so made a little speech, avowing his readiness to go to trial. No arrangements had been made to commence his trial; it had not been set down for any particular time. No preparation had been made in the way of examining the list of jurors or investigating as to their antecedents and affiliations with the Ring. Mr. Peckham and Samuel B. Garvin, the District Attorney, were present. Mr. Clinton had no idea that there was any intention on the part of the prosecution to try the case against Mayor

Hall until it should be regularly set down for trial ; and he should have had several weeks for making proper investigations in regard to the jurors. The impanelling of the jury on the first trial had occupied four days. Mr. Clinton regarded it as of the highest importance that as much care should be used in selecting jurors on the second trial as had been exercised upon the first trial. When he left the court he casually remarked to Mr. Peckham that he would probably look in again in about half an hour or so. He went to his office, and had but just arrived there when a Court officer came for him, saying he was wanted in Court right away. He at once went to the Court, and was amazed to find that during his absence of less than half an hour a jury in the case had been impanelled. Mr. Clinton, when he found that a jury had been impanelled under such circumstances, and the trial had been rushed on in such a remarkable manner, was indignant. He determined to withdraw from all connection with the case. He at once went to the Attorney-General, by whom he had been retained and under whose authority he had acted, explained the condition of affairs, and stated to him that he would not act as Counsel for the prosecution. The Attorney-General told Mr. Clinton he could not blame him for withdrawing from the case. The result of the second trial of Mayor Hall was a disagreement of the jury. Mr. Clinton considered that his connection with these Ring criminal trials was ended forever.

After the trial and conviction of William M. Tweed, in 1873, the trial of Henry W. Genet was brought on in the New York Oyer and Terminer. Mayor Hall was called as a witness by the prosecution, and gave important testimony against Genet, whose trial resulted in a conviction. This being one of the important trials growing out of the Tweed Ring frauds, it would seem that after using Mayor Hall as a witness, the faith of the

State was impliedly pledged that he should not be further prosecuted. It was, perhaps, fortunate for him that such implied faith was not kept. Not long afterwards the prosecution brought on his third trial. To this he did not object. He was ready to meet his accusers face to face; he seized with avidity the opportunity to submit his case to a jury of his peers. After a fair and impartial trial in the Court of Oyer and Terminer of the City and County of New York, Judge Brady, of the Supreme Court, presiding, Mr. Hall was triumphantly acquitted; and with this verdict the public, as well as his friends, should be content.

In all the investigations in respect to the proceeds of Ring frauds, none were ever traced to Mr. Hall. There is no evidence that he ever reaped any pecuniary advantages from his political and official relations with those who composed the Ring. Since the termination of his last trial he has stood before the community *vindicated* from the charges made against him when the Ring frauds were exposed. He has figured somewhat prominently as a lawyer and a journalist from that day until the present time, and he has had, and he now has, the esteem and good wishes of the public. However much his natural amiability and his political ambition may have led him into mistakes of judgment, his friends never lost confidence in him; and the numerous investigations, public and private, have convinced those who once doubted, that nothing worse can fairly be imputed to him than the fault of not having been sufficiently vigilant as Mayor in discovering the frauds upon the city and county treasury, and in preventing their continuance; and of neglect, even to this extent, the jury, by their verdict, said he was not guilty.

CHAPTER XXIX

TRIAL OF WILLIAM M. TWEED, IN NOVEMBER, 1873, IN THE COURT OF OYER AND TERMINER OF THE CITY AND COUNTY OF NEW YORK

Brief Account of the First Trial of Tweed.—Extraordinary Incidents connected with his Second Trial.—Charge of Judge Davis to the Jury.—Result of the Trial.—Proceedings against Tweed's Counsel for Contempt of Court.

IN the month of January, 1873, Lyman Tremain and Wheeler H. Peckham, Counsel for the prosecution, brought on the trial of William M. Tweed in the New York Oyer and Terminer, Hon. Noah Davis, Supreme Court Judge, presiding. The indictment (which contained over two hundred counts) charged Tweed with neglect of duty as a member of the Board of Audit, in omitting to properly examine and audit certain claims against the County of New York. About two weeks were consumed in impanelling the jury, after which the trial proceeded at great length. A strong and overwhelming case on the part of the prosecution was established by the evidence. Tweed's guilt was proven beyond a shadow of doubt.

The fraudulent and criminal conduct of Tweed in not properly auditing claims against the County of New York is well and clearly stated in the following extract from a pamphlet issued by Mr. O'Connor :

“In the Laws of 1870 (page 878, section 4) it is enacted that ‘all liabilities against the County of New York incurred

previous to the passage of this act shall be audited by the Mayor, Comptroller, and present President of the Board of Supervisors, and the amounts which are found to be due shall be provided for by the issue of revenue bonds of the County of New York, payable during the year eighteen hundred and seventy-one; and the Board of Supervisors shall include in the ordinance levying the taxes for the year eighteen hundred and seventy-one an amount sufficient to pay said bonds and the interest thereon. Such claims shall be paid by the Comptroller to the party or parties entitled to receive the same upon the certificate of the officers named herein.'

"Hall was Mayor, Connolly was Comptroller, and Tweed was President of the Board of Supervisors.

"These persons directed that the County Auditor collect from the committees of the Board of Supervisors all the bills and liabilities provided for, and 'that the evidence of the same be the authorization of the said board or its appropriate committees on certificate of clerk or president.'

"This so-called County Auditor was one James Watson, since deceased, then a clerk in the Comptroller's office. He made up numerous claims; and Hall, Connolly, and Tweed, separately, in pretended compliance with the above-recited act, but without any examination, certified them.

"Such certifications amounted to a sum slightly exceeding \$6,312,000. The Comptroller issued and sold to *bona-fide* purchasers the prescribed bonds to that amount, and deposited the moneys obtained thereon with the Broadway Bank to the credit of an account there kept by the Chamberlain of the City of New York as County Treasurer.

"Immediately upon such pretended audit and allowance of each claim, a check or warrant on said bank in favor of the certificated claimant for the payment thereof was signed by the Comptroller, the Mayor, and one Joseph B. Young, as clerk of the said Board of Supervisors; and such checks or warrants were accordingly paid by the bank for and on behalf of the County Treasurer and to the debit of his said account.

"The accounts or claims so audited were all false, fictitious, and fraudulent ; they were made up by fraud and collusion between the said James Watson and the defendants, Andrew J. Garvey, James H. Ingersoll, and Elbert A. Woodward ; and the payments on such warrants respectively by said bank were, pursuant to a corrupt, fraudulent, and unlawful combination and conspiracy to that end by and between all the defendants, agreed to be divided, and were divided accordingly, between the defendants Ingersoll, Garvey, Tweed, and others unknown, their confederates.

"The certificate of allowance on each claim, the check or warrant for its payment, the actual payment thereof by the bank, and distribution of the proceeds among the conspirators were in each instance substantially contemporaneous. All these frauds occurred between May 5 and September 1, 1871. A large portion of these took place after the first Monday of July, 1870. (Laws of 1870, page 483, section 11.) After that date Tweed was not an officer or member of the Supervisors' Board ; but as a private individual he continued Auditor under the section in question."

These facts were substantially shown in evidence by the prosecution. They were not in any manner disproved by the defence. Although Tweed was defended by some of the ablest and most distinguished members of the Bar, in reality there was no defence. The evidence having closed and the jury having been addressed by Counsel on both sides, the Court delivered a very strong and able charge in favor of conviction. Tweed knew his jury. All he wanted of them was to vote for his acquittal. The result was that, after the case was given to the jury and they retired, upon a ballot being taken, nine voted for acquittal and three for conviction. Of the three, two said they would vote for acquittal if the third juror would do the same. That third juror held out for conviction to the last, and thus prevented a shameful verdict of acquittal. It was not



WILLIAM M. TWEED

Alderman, Member of Congress, New York State Senator, Supervisor of County of New York, Commissioner of Public Works of City of New York, and for years the imperial "Boss" of the Democratic party of the City and State of New York



strange that the prosecution were discouraged. Their efforts for a year to bring the Ring criminal trials to a successful termination had resulted in disastrous failure. Usually, in case of disagreement of a jury, if the majority of the jurors were for acquittal, the further prosecution of the case is abandoned. Such a course in this case would not have promoted the ends of public justice. Tweed was in high feather. To all intents and purposes he had scored a great victory. All, or nearly all, the offences of which he had been guilty in his connection with the Board of Audit were embraced in the indictment in this case. One vote more in the jury-room would have given him an acquittal upon the whole of them. So far as the criminal law was concerned, he had a very narrow escape from obtaining "a clean bill of health." One more trial with such a result would probably have put a stop to all further prosecution of the Ring trials. During the summer Tweed went to California on a pleasure trip. Whether he should be tried again was a matter of indifference to him. He had no objection to taking his chances before any jury which Mr. Tremain and Mr. Peckham might impanel. Charles O'Connor, by an act of the Legislature, was placed in control of these cases, in conjunction with the Attorney-General. They both insisted that on the next trial Mr. Clinton should act as one of the Counsel for the prosecution. They desired especially that he should impanel the jury. It was represented that Mr. O'Connor had said that Mr. Clinton was the only lawyer in the City of New York who could in that case impanel a fair and impartial jury, which could not be tampered with by Tweed or any of his tools. Mr. Clinton was averse to having any further connection with the Ring criminal cases. But after careful consideration, thinking that he might prevent a lamentable failure of justice, and thus render the public a great service, he con-

cluded to waive all personal feeling, and consented to accept a retainer from the Attorney-General. It was conceded that about all which was necessary to be done for the prosecution was to obtain a fair and impartial jury. If this were accomplished conviction was sure; otherwise defeat was certain. Everything but impaneling the jury was an easy matter. The examination and cross-examination of witnesses, and the arguments to be made, were matters easily attended to—in fact, they were almost matters of form. The ground had all been gone over on the former trial; and it was well known that Tweed had no defence. Therefore, if an honest and impartial jury were obtained, the prosecution's case was won. To all intents and purposes the verdict would be known as soon as the jury was impanelled.

Mr. Clinton proceeded at once to investigate the lists of jurors, and to superintend investigations as to their character, business, and associations. Instead of detectives to hunt up their antecedents, a small army of young lawyers was employed. These lawyers were systematically divided and subdivided, so that each one made a thorough and skilful investigation with respect to the names given him. They made reports as to each juror on a slip of paper, stating his business, his character for integrity, or the reverse, what his neighbors and business friends said about him, together with any other points that were thought to be of importance; also, an opinion as to whether he would make a good or a bad juror. These reports, as fast as they were made, were given to Mr. Clinton, and he caused them to be pasted in alphabetical order in a large black book. Probably no more thorough investigations as to the qualifications of jurors were ever made. These young lawyers were keen, alert, discreet, and persevering. It was not known until just before the trial began that Mr. Clinton was in the case. Tweed, supposing that, as a matter of course, Messrs.

Tremain and Peckham would impanel the jury, hurried back from California, so as to be on hand promptly at the time appointed for the trial.

On the 5th of November, 1873, the second trial of Tweed was brought on in the New York Oyer and Terminer. Hon. Noah Davis, Supreme Court Judge, presided. Lyman Tremain, Wheeler H. Peckham, Henry C. Allen, Assistant District Attorney, and Mr. Clinton appeared as Counsel for the prosecution.

The Counsel for the defence, before the trial actually commenced, handed Judge Davis the following paper :

“COURT OF OYER AND TERMINER.

“*The People, etc., against William M. Tweed.*

“The Counsel for William M. Tweed hereby respectfully present to the Court the following reasons why the trial of this defendant should not be had before the Justice now holding this Court :

“First. The said Justice has formed, and upon a previous trial expressed, a most unqualified and decided opinion unfavorable to the defendant upon the facts of the case, and he declined to charge the jury that they were not to be influenced by such expression of his opinion. The trial by jury, influenced as it necessarily would be by the opinions of the Justice formed before such trial, would be had under bias and prejudice, and not by an impartial jury, such as the Constitution secured to the defendant.

“Secondly. Before the recent act of the Legislature of this State, providing that challenges to the favor shall be tried by the Court, any person who has assumed a position in reference to this case and this defendant such as said Justice has assumed would have been disqualified to act as trior. The defendant is no less entitled to a fair trial of his challenges now than he was formerly. What would have disqualified a trior then must disqualify a Judge now.

“Thirdly. Most of the important questions of law which

will be involved in the trial have already been decided by the said Justice adversely to the defendant, and upon some important points his rulings were, as we respectfully insist, in opposition to previous decisions of other Judges. Although there may be no positive prohibition of a trial under these circumstances, it would be clearly a violation of the spirit of our present Constitution, which prohibits any Judge from sitting in review of his own decisions.

"The objection to a Judge who has already formed and expressed an opinion upon the law sitting in this case is more apparent from the fact that in many States where jurors are judges of law as well as fact he would be absolutely disqualified as a juror.

"DAVID DUDLEY FIELD,	J. E. BURRILL,
"JOHN GRAHAM,	ELIHU ROOT,
"WILLIAM FULLERTON,	WILLARD BARTLETT,
"W. O. BARTLETT,	WILLIAM EDELSTEN."

Upon the presentation of this protest, the following proceedings occurred, according to the report in the *New York Sun* of the 6th of November, 1873:

"On the formal opening of the trial Mr. Fullerton, after consultation with his associates, presented to Judge Davis a paper understood to be a protest against Judge Davis sitting to try the case. Judge Davis read the paper, and inquired of Counsel what action they proposed should be taken on it.

"*Mr. Fullerton.* 'I suppose it remains for the Court to say what action will be proper. It is suggestive on our part. Of course we can make no motion in regard to it. All that we could do was simply to present it for the Court to take such course as seems right and proper in your judgment.'

"Mr. Tremain requested that Counsel for the prosecution be made aware of the contents of the paper.

"Judge Davis ordered it to be handed to him, saying:

‘The gentlemen have handed me a paper of which, of course, I am not qualified to form or express an opinion, although some of the statements are entirely inconsistent with truth, and must have been known to be so when presented. One statement is entirely untrue.’

“Mr. Tremain, having read the document, returned it to the Court, adding that it was an extraordinary time to present such a paper, after the case had been set down and called for trial.

“*Judge Davis.* ‘I think it my duty, under all the circumstances, before proceeding, to consult with my brother Judges, to see what course, with proper respect to myself, the Court should take.’

“*Mr. W. O. Bartlett.* ‘I wish to say one thing—if I have understood the remarks of the Court correctly—and that is, that we take no course with reference to the Judge presiding in this case that we would not take if a saint from heaven were on the Bench under the same circumstances. We make no statement in that paper, and are incapable of making any, which we do not believe to be absolutely true.’

“*Judge Davis.* ‘It would be hard to convince me that the Counsel or anybody else present at the former trial believes one statement in that paper to be otherwise than inconsistent with the truth.’

“*Mr. Fullerton.* ‘Will the Court be kind enough to say what that statement is?’

“*Judge Davis.* ‘It is unnecessary. I will take a recess, with a view of consultation with my brethren of the district as to the proper action to be taken to sustain the dignity of the Court.’

“Judge Davis’s face was flushed when he ascended the Bench after recess. He was evidently laboring under strong emotion, and could with difficulty control his feelings. He said: ‘In respect to this extraordinary paper that has been handed to me, I and my brethren concur very fully as to the view I ought to take of it. I shall proceed with this case—indeed, this extraordinary paper leaves me no alterna-

tive, if I have any self-respect whatever, but to go on; but I shall reserve for a future occasion such proceedings as in my judgment are required to vindicate the dignity of the Court, and of the profession itself, from what I deem a most extraordinary and unjustifiable procedure.'

"*Mr. W. O. Bartlett.* 'I did not hear the last words, if your Honor please.'

"*Judge Davis* (pale and knocking with the gavel). 'Sit down, sir! I have examined the charge given by myself, and it nowhere sustains any part of the statement, which I find to be as unfounded as it is untrue. No further notice will be taken of this paper at present, but such action as may be deemed proper will be taken hereafter. Proceed with the case.'

"*Mr. Graham.* 'I wish your Honor would permit an explanation now.'

"*Judge Davis* (interrupting). 'I cannot allow any remarks on the subject.'

"*Mr. Graham.* 'All I ask is an opportunity to show that the facts alleged in that paper are true.'

"*Judge Davis.* 'No, sir.'

"*Mr. Graham.* 'You say, in the presence of the jury, that we have departed from the truth; and I say, in the presence of my Maker, that I have not departed from it.'

"*Judge Davis* (rapping with his gavel). 'Counsel need not have any fear but that an opportunity will be afforded them.'

"*Mr. Graham* (after a brief and whispered consultation with Messrs. Bartlett and ex-Judge Fullerton). 'Will your Honor allow us an opportunity to consider whether, after that disparagement, we ought not to retire from the case?'

"*Judge Davis* (quickly). 'This case must go on. It must go on.'

"After another brief consultation with Mr. W. O. Bartlett, Mr. Graham said: 'Not knowing what the Court's action will be, whether it would adjudge us in contempt or not, we ask an opportunity to send for Counsel and put ourselves under his direction.'

"*Judge Davis.* 'Have you any question to make in respect to these proceedings?'

"*Mr. Graham.* 'I have this to suggest in advance—whether we ought not to have time to consult with Counsel as to the course we should choose to take with respect to Mr. Tweed. If we determine to desert him now, it will be impossible for him to supply himself at once with Counsel competent to carry on his case.'

"*Judge Davis.* 'This case must proceed, sir. I shall give no time for Counsel to mutiny against their client.'

"*Mr. Graham.* 'If we are entitled to an exception, I respectfully take an exception. I except to the remarks of your Honor, and especially to the word "mutiny." My oath knows no such word as "mutiny."'

"*Judge Davis.* 'No exception can be allowed. I told Counsel in advance that no action can be taken on this paper until the trial is closed.'

"*Mr. Graham.* 'We except, if an exception is worth anything.'

"*Mr. W. O. Bartlett.* 'The only point, your Honor, is that you leave us to go through the trial resting under an imputation that we feel to be unjust. Will you not, from a sense of fairness, give us an opportunity to vindicate ourselves to your Honor?—not to any one else but your Honor.'

"*Judge Davis.* 'No action can be taken on that paper at present. The trial must go on. If Counsel remain under an imputation through the trial, Counsel may as well respect the fact that the Court remains under an imputation also.'

"*Mr. Graham.* 'The Court can serve us both by granting us a hearing now.'

"*Mr. W. O. Bartlett.* 'Is that decision so fixed that you will not hear reasons which, in fairness to us and justice to yourself, you ought to hear?'

"*Judge Davis.* 'I wish to hear nothing more on that subject. Counsel will have both time and opportunity hereafter. You must go on with the trial.'

"*Mr. W. O. Bartlett.* 'We fear it will injure our client.'"

The trial at once proceeded. When the jurors were called and challenged, Mr. Clinton had occasion very often to refer to the book in which were pasted the slips containing information in respect to them. A great deal was said in the newspapers in regard to "that mysterious black book." Many of the jurors reported to Mr. Clinton as "good" he rejected as bad, as he had much information respecting them which was not accessible to those who investigated them.

The difficulties in the way of impanelling a fair jury in the case of Tweed were much greater than in Mayor Hall's case. Tweed had been virtually monarch of the city. To a large extent the officials of the City and County of New York were his friends, and had secured their positions through his instrumentality. The machinery for turning out jurors was supposed to be in his interest. His power, though weakened by recent events, was still great. There were many—very many—who would not only still swear *by* him, but would swear *for* him, if they could thereby get upon the jury and serve him. The difficulties were increased by the recent change in the law respecting the trial of challenges to jurors. Messrs. Tremain and Peckham, having been so singularly unfortunate in selecting a jury on Tweed's first trial, secured from the Legislature a change of the law, so that challenges to the favor, as well as those for principal cause, had to be tried by the Court. Formerly, when challenges to the favor were tried by triors they could reject a juror for almost any reason, although all his answers to questions might on their face imply that he was unbiased, and was in all respects a fit juror. His manner, his anxiety to go upon the jury—the very expression of his countenance—might convince them that he was biased; whereas the Court on the trial of a challenge to the favor would be loath to hold that the juror was biased, unless there was something in his testimony

which on its face implied an unfitness to serve as a juror. It would be but natural that the Court should desire to have some evidence on record to justify its findings. Many jurors who were called and challenged to the favor, who were, in fact, biased, and who were the friends of the defendant, testified to the absence of bias and to their extreme impartiality, and their determination, if they went upon the jury, to be governed entirely by the evidence. On the face of their evidence they would have made model jurors. With such it was no easy task to develop on their cross-examination enough to justify the Court in rejecting them. Yet the information of Mr. Clinton in respect to these jurors was such that he was able to accomplish this result in every instance, with a single exception. Never, in any trial that ever occurred in the City of New York, was it so difficult to obtain an impartial jury. The task seemed almost impossible. The selection of the jury proceeded slowly. As they were decided to be competent and fit jurors, and accepted as such, they were not sworn at once, but set aside. This continued until the entire twelve were selected. When the Court adjourned, those selected were permitted to go to their homes as usual; but each was "shadowed"—that is, watched by an officer of the Court. One day, among those selected was one who appeared to be an Italian. Upon a challenge to the favor, when asked if he knew Tweed, he said: "Who is Tweed?"—he had never heard of such a man. Upon being questioned with regard to other members of the Ring, he answered that he never heard of any of them, and he did not know if there ever were any such persons. Mr. Clinton took an especial dislike to this juror and did his utmost to extract from him some answers that would justify the Court in rejecting him; but all in vain. When the Court adjourned that day, the officer in command told Mr. Clinton that he was

short of officers and that there were not enough to watch all the jurors. He asked Mr. Clinton if there were any one juror he desired especially to be watched. Mr. Clinton told him by all means to have this particular juror watched closely. This was done; and before twelve o'clock that night he was traced in communication with Tweed. The next morning when the Court convened this juror was dismissed with a scathing rebuke from the Court.

Finally, a full jury was selected and sworn; and from that time until the end of the trial they were kept together. When they went to their meals, and when the Court adjourned for the day, they were put in custody of twelve officers—one officer for each juror. These officers were required to make constant reports, and to permit no one to have any communication with any of the jurors except by special permission of the Court. Lest some of these officers should prove derelict in their duties, twelve watchers were appointed to watch them, and they were required to make a daily report. Then, in order to make assurance doubly sure, twelve more were appointed to watch the watchers, and they also were required to make a daily report. With so many persons to make a daily report, there was not much danger that any of the jurors would be tampered with. During the progress of the trial the jurors were furnished with an illustration of the consequences of jurors violating their duties. In the case of Stokes, tried a short time before for the murder of James Fisk, several of the jurors had been charged with, and convicted of, corrupt practices. One day during the progress of the Tweed trial the District Attorney's representative asked the Court to suspend proceedings for a short time in order to enable him to make a motion in another case. The Court granted his request, upon which he moved that the Court pronounce sentence upon the convicted jurors

in the Stokes case. The Court at once sentenced them to several months' imprisonment in the penitentiary. Then the trial of Tweed was resumed and went on as usual. The evidence given on the second trial was about the same as on the first trial, with a single exception. Andrew J. Garvey testified at great length on the former trial. The defence before the jury in large part consisted of denunciation and invective heaped upon him. On the second trial, upon consultation of the Counsel for the prosecution, it was determined not to call him as a witness, inasmuch as the main facts to which he would testify positively could be established by circumstances; and the inferences from such circumstances would be quite as effective as the positive testimony of one who had turned State's evidence. This was a sore disappointment to Counsel for the defence. John Graham, the leading Counsel, and the most able, brilliant, and distinguished criminal lawyer at the New York Bar, made great preparation for the cross-examination of Andrew J. Garvey. It was said that the night before it was expected that he would be called Mr. Graham sat up all night preparing an elaborate brief from which he expected to cross-examine this witness. When the prosecution rested without calling Garvey, Mr. Graham was dumfounded. No lawyer was ever bereaved of his "thunder" under more painful circumstances. The best part of his address to the jury would have been the excoriation of Garvey. To address the jury with no Andrew J. Garvey in the case was like the play of "Hamlet" with Hamlet left out. On the 18th day of November the Counsel on both sides, after the evidence was closed, having addressed the jury, Judge Davis delivered the following charge :

"If it were consistent with my sense of the duty which I owe to the high office which has been conferred upon me,

and to justice, I would most gladly refrain from saying a word to you in connection with this case. I would willingly hand over the case to you, telling you to judge of the arguments of Counsel on both sides and the evidence laid before you, simply saying, 'Take it, and do what you think is fair and right'; but I cannot think that that would be a proper discharge of my duty. I do not believe with those who think that a Judge performs his duty when he submits naked propositions of law and refrains from laying before the jury what he deems to be the points of fact in the case, and the application of the established rules of evidence to those facts. In all cases the jurors are the judges of the facts, and I do not wish to trench upon the duty which the law has imposed upon you in that respect. There is in this country no law for the rich that differs from the law for the poor. All men are entitled to a just and even-handed administration of the law regardless of their position in life or society, their wealth or their poverty, their standing, whether high or low; and if, unfortunately, in the administration of justice it turns out in practice that the law is permitted to operate differently upon the humble and the poor and upon the rich and powerful, it is not because the law is not in itself right and equal, but because Courts and juries are weak, and sometimes worse than weak. It arises from the nature of our institutions that all civil officers are the servants of the people; that the people select from themselves persons to fill offices who are clothed with powers and duties to be administered for the well-being of the whole community. It is, of course, impossible for the people to gather together in a body, acting for themselves in the administration of the laws; that duty must be intrusted to the selected agents and servants of the people. If at any time in the future it should become the permanent idea of officials that their offices are the means of enriching themselves regardless of the interests of the people, and if upon that there should grow up another still worse—namely, that officers who have violated the law and plundered instead of protecting the public interests have with the money thus obtained



HON. NOAH DAVIS

Presiding Judge of New York Supreme Court, First Department



the means of purchasing their own immunity—then, indeed, our government would be an absolute and an awful failure.

“The real question involved in this issue is a very simple one, and lies in a nutshell. Strip the charge of its surroundings, its adventitious, and in some respects false, circumstances, and place on trial on the same charge some indifferent person who has not exercised power, not possessed wealth, not acquired large influence, and the case will be very simple and easy of determination. I desire in what I have to state to you to submit as clearly as possible the exact propositions on which your judgments will have to be pronounced. In 1870 the Legislature of this State saw fit to provide a mode of auditing several existing county liabilities, and for that purpose they selected a board, or commission, which, to adopt the name given it by Counsel, was known as the Board of Audit. The Legislature gave to this body a very large power. It provided that the officers named, of whom the defendant was one, should audit all existing liabilities prior to April 26, 1870. Three officers were named who were clothed with powers the effect of which was to protect the citizens from unjust claims and liabilities. The three were to consider such claims as were laid before them in their collective capacity.

“In the indictment in this case it is charged in the three first sets of counts that the defendants neglected to perform the duties imposed upon them as auditors, and upon that subject a good deal of evidence has been produced before you. It is said that these three gentlemen had no meeting but one, and that instead of acting as the statute provided, they all left the whole subject to certain clerks, and, without meeting themselves, simply gave certificates which were sent from one office to another. If that were so, and if you are satisfied from the evidence that, instead of convening for the purpose of passing upon these accounts a proper judgment, they intrusted the matter to other officials and signed certificates on the basis of the action of others, and that the defendant did that, then it is your duty to pronounce him guilty under the three first sets of counts, in which a

verdict is asked by the prosecution, because in that case he would have failed to have performed the duty enjoined upon him by law. If an officer clothed with power to do a particular thing neglects to do it, and does something else not in conformity with law, he is guilty of wilful neglect.

“During the period between the 5th of May and 1st of December, there were the accounts of twenty-six days which were audited, or professedly audited, so far as the papers before us disclose. In connection with these twenty-six occasions of audit is there any evidence tending to show that A. Oakey Hall, William M. Tweed, and Richard B. Connolly ever met in active council? I am at a loss to call your attention to any evidence showing that they convened to pronounce judgment upon the accounts in their collective capacity, as required by law, but if there is any evidence of that character, of course it is your duty to recollect and apply it for the benefit of the defendant. I ask you whether, in looking over the evidence in the case, you can say whether or not these three gentlemen, instead of meeting after the first occasion, intrusted the whole matter to somebody else, and allowed that somebody else to judge as to whether the accounts were right or wrong? If so, there must be a conviction under this indictment.

“Your attention has been called to the several claims presented, and I will refer to them without any particular regard to the order in which they were mentioned. In the first place, the claim of McBride Davidson was brought to your notice as tending to show that the Board of Audit intentionally omitted to perform the duties required of them by law. McBride Davidson had an account against the State of New York to the amount of sixteen thousand two hundred and forty dollars (\$16,240). That claim, he said, was a just one, but somebody, it is asserted, converted it into a false claim of forty-nine thousand dollars (\$49,000), and the Board of Audit granted a certificate for it at that sum, a large portion of the money being on the very same day transferred to the account of Mr. Tweed at the Broadway Bank. What the reasonable conclusion to be drawn from

that is, it is for you, and not for me, to say. Without a solitary explanation touching the accounts, what is the conclusion which a fair-minded, honest man, sitting in the jury-box, would draw from the evidence? That question is one of fact for you, and not for me, and I submit it to you for your consideration in the absence of all explanation touching the subject-matter. Now if it be true, as shown here, that a portion of Davidson's bill, amounting to forty-nine thousand dollars (\$49,000), passed into the hands of Woodward, and was thence transferred to Tweed, forming a part of his credit in the Broadway Bank—if that be true, and you are satisfied of it from the evidence, you will have to ask yourself what would be a reasonable conclusion as to whether that degree of diligence required by law was omitted or not in ascertaining the true character of the amount. It may be claimed that after all there was some indebtedness which Woodward was paying in making the transfer, or that there was some mistake, and that it was retransferred to Woodward instead of being drawn out by Tweed, or that there was some transaction which explained the final transaction of paying the money in that form; but in the absence of all explanation, all that is left to an intelligent juror is to say what is the truth as to whether or not these gentlemen exercised their duty as a body in examining that account. If you say they did not, and that the city has been defrauded of the amount of the difference between \$16,000 and \$49,000, then what is your duty on the question of the guilt or innocence of the parties connected with it? But if that case stood alone in respect to the action of the board, you might more reasonably, perhaps, feel it your duty to conclude that there was some mistake, that the Board of Supervisors had it under consideration, or that it was accidentally omitted; but when you couple with it the fact that one hundred and ninety other vouchers, as shown by the books of the bank, were passed upon by that same board, and find that out of the one hundred and ninety vouchers, amounting to over six millions of dollars, there went into Woodward's account the sum of \$3,581,254.26, and into Ingersoll's account \$3,549,-

320.18, and when you find that of these sums that went into Woodward's account, concurrently and on the same day the credit was given to Woodward, there passed from Woodward by transfer into the account of Mr. Tweed \$932,858.50, what, then, I ask, will be your judgment as to the character of the transaction? Now as to the question whether or not they did their duty in examining and auditing the accounts. I call your attention to these claims of Ingersoll & Co. Keyser & Co. have sixteen accounts, and we have ten of their vouchers. Now the point is this, whether or not these gentlemen, when they came to act as auditors, did take up these accounts, pass upon them as the law required; or whether they took somebody else's ideas, and failed to pass upon them as a Board of Audit.

"In the first place, Keyser's accounts are produced, and, according to his testimony, they are of this character. He said he had claims running back four or five years presented to the Board of Supervisors, and there they remained. He was directed by Watson to take these accounts and make out new bills to be presented to the Board of Audit. Instead of stating them as accounts which had occurred years before, he put to them false dates in the years 1868 and 1869. There is nothing on the face of these accounts to show that any of them occurred in the year 1868; on the contrary, the reverse is evident, but they were presented as having occurred between these dates. The accounts, according to these statements, were false in respect to their dates. Then their character, as appears upon their face, is an important subject in determining whether or not they were audited. You saw some of them. I have one now before me; it commences, 'Board of Supervisors, to work done for new Court-house, including plumbing, etc., and furniture omitted in general bill.' It commences with the date July 20, 1869, and specifies a series of items, and then it contains various other items of a similar character, making the aggregate \$16,015.50. If that account were brought to you without giving any man's name, and stating it to be items omitted in general bill, the first inquiry would be, Whose

bill is this? Where does it come from? and similar inquiries. But this bill is passed upon and certified on its face by Mr. Tweed as correct. 'We certify that this bill is correct.—William M. Tweed, Chairman.' That bill is passed for the whole amount, without the slightest appearance on the bill itself in whose favor it was drawn out. The bill being for items in the general bill, a proper inquiry would be, Where is the general bill from which these items were omitted? Does the passage of such a bill under such circumstances indicate that they examined it at all? That is a question for you solely. Here is a bill for work done to the county offices of the new Court-house, which is dated May 4, 1869. The principal item is for plumbing work and gas work for \$17,944—without a solitary item. Where are the bills rendered for that? We have no evidence that any such bills were rendered, except, as this gentleman states, that bills were rendered long before which were brought into these bills, and we have no evidence that they were before the gentlemen of this commission at all; and yet there is an allowance here of seventeen thousand dollars in that item upon a simple claim of bills rendered. I call your attention to these circumstances as bearing on the question whether or not the Board of Audit performed its duty in examining these accounts and passing upon them as required by law. If they did not, and you are satisfied of it, then it will be your duty to render a verdict of guilty under the law of an omission or neglect of audit, because they cannot be excused upon the ground of ignorance of the law. If Mr. Tweed participated in that neglect, the offence is made out against him. The character of these accounts is stated by Keyser; and what became of them? Every dollar of the whole amount, the entire sum of \$400,000, or a little more, went into Keyser's account. Keyser says he never got any of it, and on the same day that these several bills are apparently certified by the Board of Audit, on that same day they go into Woodward's account in forms of warrants, and simultaneously a sum equal to twenty-four per cent. of the whole amount is transferred from Woodward's account, by checks,

to Tweed. What is the character of the transaction? And this is a point to which you will direct attention, and which is for you exclusively to determine.

“Let us look for a moment at the character of Garvey’s accounts. These are among the lost vouchers, and the Court held that the circumstances justified the admission of secondary evidence as to the contents of those vouchers. Unfortunately, we have not the vouchers, but the warrants that were drawn. The witness says he took from several accounts the items, so as to state on these warrants for what they were drawn. Here is the first warrant—May 6, 1870. It shows that these gentlemen, who met May 5, certified this account so that the money was paid on it. It states on its face for plastering [and the Court here read off from the list a large number of bills presented by Garvey, dated from May to December, and all amounting to something like \$45,000 each]. Now, gentlemen, I call your attention to the character of these accounts, to show whether or not there were on the face of these accounts something that would give notice to the Board of Audit, so that they would pass upon these bills without inquiry as to their correctness. All these bills were for repairs to the new County Court-house, and certainly it had an unhappy habit of falling out of repair, if these accounts are correct. Another question for you is this: Did Mr. Tweed perform the duties the law required in looking into these accounts; or did he simply sign whatever was brought there by somebody else? You are to look at these various accounts of Garvey, in the aggregate \$1,177,413.72, in order to see what disposition was made of them; and here—as appears by the books of the bank, which were not controverted, for nobody has attempted to say that they are not true—you find that out of that amount \$779,615.69 were transferred to Mr. Woodward; and then on the same day and at the same time, as also appears by the books of the bank, a sum equal to twenty-four per cent. is transferred to Mr. Tweed’s account. Now I am simply stating what appears in the papers, and the question whether these papers were fabri-

cated is to be decided solely by you. I have gone through the whole account in this cursory way for the purpose of calling your attention to the responsibility of the defendant for the transactions of the several members of the board, and himself as one member. For, as a matter of course, you are to find that he himself participated, or he cannot be convicted ; he is not liable for the misconduct of either of the others. He is liable for his individual neglect of duty, and he is liable with the others for joint neglect of duty. It is a mistake to suppose that in such a case as this a party must have been proved to be guilty of neglect jointly with somebody else. If there is in this case evidence against Mr. Tweed, it is no matter whether or not there was evidence against the others.

“I have said all I wish to say in respect to the first three counts in regard to the claims of Garvey, McBride, Davidson, and Keyser. If you come to the conclusion on the evidence that Tweed neglected his duty in not meeting for the purpose required by law, and signed certificates which were not audited, then it is your duty to convict him under the first of these several counts ; and if you come to the conclusion, also, that Mr. Tweed neglected to ascertain the correctness of these accounts, by which neglect the people were injured, then he is liable to conviction under the second of these three first counts. As to the question of official misconduct, the evidence in that is the evidence I have gone over on the question of evidence, coupled with the evidence of the amount of money he possibly received from these various amounts. The amount he received, as shown by the books of the bank, is over one million dollars, and, with the sum of two hundred thousand dollars that went into his account from other sources, the aggregate amount received by Tweed is over one million two hundred thousand dollars. It is for you to say what is the fact in such a state of facts, especially where the circumstance is unexplained. The law does not presume guilt, but the law presumes that there is something which needs explanation and requires satisfactory evidence that this transaction was not a corrupt transaction.

That is for you to say. I submit it to you, that of these millions which were passed, more than three millions went to Woodward's account, and that of that amount more than a million went directly to Tweed's account ; and then when we have these facts presented to us upon the proofs of the books of the bank, the vouchers, etc.—when we have all these facts—then it becomes the question for the jury to determine, in the absence of all explanation, what that means. It is true that Mr. Tweed is a competent witness here, if he desires to be sworn ; but nothing is to be presumed from the fact that he does not put himself upon the stand. So far as the explanation might have come from his own lips, you are not to infer anything by reason of his own personal silence. But the explanation could have been made by Mr. Tweed what these enormous amounts were for, and what he did to obtain them. If you ask yourselves these questions, you have the right to ask what are the just and fair consequences ; and if you come to the conclusion that this was a transaction by which Mr. Tweed, in connection with other officers of this city, instead of protecting its funds, entered into a conspiracy which resulted in bringing a million dollars into his pocket, and you come to the conclusion that this is the truth, then the law requires at your hands that you should convict him, and you should not hesitate to convict, as otherwise there is no protection for the community against the rapacity and avarice and wickedness of public officers. I am asked to charge you, also, that the presumption of law is that a man is innocent of crime. That is true, and Mr. Tweed has undoubtedly the benefit of that presumption so far as it goes. He is entitled to that presumption until it is overthrown by the evidence, and you fail to convict until the evidence renders conviction a necessity beyond reasonable doubt. That is the law. Reasonable doubt is that doubt which springs from the character of the evidence. If it is of an unsatisfactory nature, you are bound to acquit ; but if the evidence produces moral conviction that the party is guilty, then it is your duty to convict him. If it fails to do that, and leaves that question in what the law

denominates a state of reasonable doubt, then it is your duty to act accordingly. I am asked to say that there are two presumptions in favor of Mr. Tweed—one a reasonable presumption of innocence and the other the presumption that in performing an official duty he acted right. All I have to say is that the latter proposition, like the presumption of his innocence, stands up to the time when the jury is satisfied by evidence of its falsity. In taking this case to the jury-room, all I desire to say, in addition, is that I hope you will prepare to pass upon it with a view to your own personal responsibility; first, as to your oaths and your own consciences; secondly, to your obligations to protect society against the rapacity of public officials who have been guilty of offences against the law; and, lastly, with the view, if the evidence fail to establish guilt in the case within the rules I have given you, you will give the defendant not only a reasonable doubt, but the failure of proof and acquittal.

“I observe in this Keyser indictment there are sixty-four counts in all. Three of them in each set are for direct negligence, and the fourth one for misconduct in office. If you find him guilty in respect of these, you will state your verdict to be that you find him guilty upon the sixty-four counts in relation to the Keyser account. If you find him guilty of part—not of the whole—you will state for how many of these counts you find him guilty. If you find him guilty of the Davidson account, you will state whether you find him guilty of the whole or part. You will so state, in respect to the Garvey accounts, of which there are a large number, and it will be sufficient if you find a verdict of guilty on these counts in the indictment, as being counts in the Garvey claims. Of the remainder of the counts in the indictment, I do not think there is sufficient evidence given. There is some evidence in the various counts, but it is not followed up by proofs—by the production of such evidence as seems to me should find the defendant guilty. If you find a verdict of guilty on the others, the Court will find a verdict of ‘not guilty’ upon these, so you will not have to discriminate. If you fail to convict him

on any of the counts in the indictment, it is your duty to render your verdict of not guilty."

The jury retired to consider their verdict. Tweed, to all appearance, bore up bravely. He had been accustomed so long to defy public opinion and to achieve results by corrupt practices that he could not realize that with him the tide had turned, that disaster was so near, and (with the exception of a short period as a fugitive from justice) the next twenty-four hours would be the last day of personal liberty he would ever enjoy. The offences charged against him in the indictment were simply misdemeanors. He was on bail; and, after the jury retired, he could have crossed over to Jersey City or to Hoboken, where he would have been safe in case of an adverse verdict. He could not have been brought to New York upon a requisition on the Governor of the State of New Jersey. Mr. Clinton was informed that during the evening, when the jury were out, one of Tweed's friends told him he did not like the "appearances of things," and advised him to slip over to New Jersey; and that Tweed's reply was, "Don't you bother yourself—I know it is all right." It is probable that Tweed paid a very large sum of money to some one to "fix" one of the jurors. If so, Tweed himself was badly cheated. When the jury agreed, after having been out about twenty-four hours, and came into Court, Tweed was present and heard the verdict "Guilty" pronounced against him. He was immediately ordered into custody.

For the first time since the Reform movement began, Tweed realized his position. He was a convict and a prisoner! How was the mighty fallen! There was the man, with the legal brand of crime upon him, who, less than three years before, wielded a power more vast in extent, more fatal in its far-reaching consequences, than that of any crowned head in the Old World. How

changed the scene from the days of his prosperity, when the vulgarity of his grandeur was only relieved by the sublimity of his crimes; when there were few, indeed, in the city of New York, or throughout the State, in public or official station, who with respect to him would not

“Crook the pregnant hinges of the knee,
That thrift might follow fawning.”

There he was, shorn of power, deserted by friends that had basked in the sunshine of his prosperity, shunned by all, including the parasites and sycophants who swarmed about him in the day of his power! If, in his prosperity, his example bred crime and moral pestilence, the lesson of his fall surely would not be lost on the rising generation.

“But yesterday, the word of Cæsar might
Have stood against the world: now * * *
* * * none so poor to do him reverence.”

During the progress of the trial, Henry C. Allen, Assistant District Attorney, suggested that the Court had power to pronounce cumulative sentences; that is, that it had the power to sentence to fine or imprisonment for every offence embraced in the indictment under which the prisoner had been convicted. All the Counsel for the prosecution examined the question and reached the conclusion that probably the Court had that power. The question was new in this country. In the Tichborne case, in England, the Courts had decided in favor of the existence of the power. Mr. Clinton thought that the question ought to be settled by the Courts of New York; and that the case of Tweed was a proper one to test it. This question was elaborately argued before the Court by Counsel on both sides. Judge Davis held that the power to impose cumulative sentences ex-

isted; and he proceeded to exercise such power. The indictment upon which Tweed was tried contained two hundred and twenty separate and distinct counts, each charging a misdemeanor—namely, a neglect of duty, as a member of the Board of Audit, in respect to claims against the county of New York. Upon two hundred and four counts he was found guilty. Judge Davis sentenced him upon twelve of the counts to twelve successive terms of imprisonment of one year each, and to fines of \$250 each upon these twelve counts; and upon other counts to additional fines, amounting in all to twelve thousand five hundred dollars.

At the close of the trial, Judge Davis, addressing Counsel for the defence, said:

“During this case an occurrence took place that I gave notice would be taken into consideration after the close of the trial. If it will be convenient to deal with it on Monday, the Court will enter upon the inquiry. The matter is in relation to the action of Counsel at the beginning of this case. They will easily understand to what I refer.”

On Monday the matter was adjourned until the ensuing Friday. After hearing affidavits of Counsel for the defence, and what they had to say, Judge Davis in rendering his decision, among other things, said, according to a report in the New York *Daily Times*:

““This paper, then, says that “he declined to charge the jury that they were not to be influenced by such expressions of his opinion.” That I characterized, when this paper was brought to my notice, as an untrue statement. * * * If the original paper had been handed or sent to me privately, or out of Court, so that I could regard it as to me only as a Judge or as a private citizen, I should be willing to adopt the views and suggestions of the learned Counsel in respect of its objects and purposes. Indeed, if it had urged me under such circumstances it would have dropped silently

into oblivion. * * * Looking at this whole paper, and it is an extraordinary paper, I am at a loss to see on what possible grounds Counsel can justify its presentation to the Court under the circumstances. It struck me at the moment, as it strikes me now, as an effort to induce the Judge before whom that case had been moved to leave the bench and surrender the position in which he was sitting ; in short, by the combined effect of the names of a large number of eminent Counsel, intimidate the Court from the performance of the duty the law and the Constitution devolved upon him, notwithstanding the statements made. Receiving them, as I mean to do, with all respect, I cannot but remain in the belief that, in the extraordinary case depending before this tribunal, Counsel thought it possibly their duty, thought it a part of their professional tactics, which a great exigency justified, to drive, if possible, from the performance of his duty, a Judge who they feared might be sitting to hold the Court. I have no hesitation in saying that it is my firm conviction that if such a paper as that had been presented to one of the tribunals of England at this hour, clothed as those tribunals are with power which the laws of this country withhold from its Judges, not one of the Counsel who signed that paper would be sitting before any tribunal to-day, and not one of them would find his name upon the roll of lawyers, or barristers, or counsellors of that country a single hour after that paper had been presented. * * * And I feel it my duty now in this case—while I will do nothing harsh or unkind whatever—to make the mark so deep and broad that if it has been heretofore, as has been insinuated, the custom to drive Judges from the bench by the presentation of such documents, or by the oral presentation of such suggestions, the boundary between the past and the present shall not be unobserved ; but, on the contrary, all members of the profession shall know that at least hereafter such efforts are obnoxious and open to censure and punishment. I have no disposition to do anything to degrade any of the gentlemen before me. I shall not do that. I shall not commit any of them to imprisonment, but I deem it my duty to

impose a fine upon some of these gentlemen to the extent the law permits. I shall impose upon John Graham, William Fullerton, and William O. Bartlett, a fine of two hundred and fifty dollars each, and order that they stand committed until the fine be paid.

“ ‘ In respect to the younger gentlemen of the Bar whose names appear in this paper—Elihu Root, Willard Bartlett, and William Edelsten—I have this to say : I know how apt young Counsel, when associated with more experienced and distinguished gentlemen, are to follow their lead rather than to act upon their own judgment. I know it from my own experience ; and I am fain to believe in this case that neither of those gentlemen, of his own motion or suggestion, would have felt it his duty to have presented such a paper as this to the Court. Mr. Edelsten did not take any active part in the trial, therefore I do not speak of him. I have concluded this, in respect to these three gentlemen : that I will impose upon them no penalty except what they may deem such in these few words of advice. I ask you, young gentlemen, to remember that good faith to your client never can justly require bad faith to your own consciences ; and that however good a thing it may be to be known as successful and great lawyers, it is even a better thing to be known as honest lawyers—[great applause] ; and there is no incompatibility whatever in the possession of both of these characters.’ ”

CHAPTER XXX

CASE OF WILLIAM M. TWEED

Subsequent Fate of Tweed.—Letters of Judge Davis, Charles O'Connor, and George F. Comstock, in Respect to the Decision of the Court of Appeals with Regard to Cumulative Sentences.

AFTER Tweed had been confined in the penitentiary for over a year and had paid one fine of two hundred and fifty dollars, upon his application a writ of *habeas corpus* was granted to inquire into the legality of his continued imprisonment. The Supreme Court at General Term in the First Judicial Department held that Tweed was not entitled to be discharged upon the *habeas corpus*. The case was taken to the Court of Appeals; and in June, 1875, that Court decided unanimously that all the sentences, except one year's imprisonment and one fine of two hundred and fifty dollars, were illegal. (People *ex rel.* Tweed *v.* Liscomb, 60 New York Reports, page 559.)

Mr. Charles O'Connor was greatly chagrined at this result. In response to a communication to him from Judge Noah Davis, he wrote a letter (which appeared in most of the newspapers), assailing the Judges of the Court of Appeals with great virulence. He not only denied the correctness of the law laid down by them, but he attacked their motives with merciless severity. Had almost any other lawyer written and published such a letter, he would probably have been severely punished for contempt of Court, and might have been disbarred.

Hon. George F. Comstock, an ex-Judge of the Court of Appeals (who argued the case in that Court on behalf of Tweed), replied to Mr. O'Connor in a letter in which he vindicated the Judges. The letters of Judge Davis, Mr. O'Connor, and ex-Judge Comstock, are as follows:

JUDGE DAVIS'S LETTER

“NEW YORK, *June 24, 1875.*

“SIR,—A critical examination of the opinions delivered in the Court of Appeals in Tweed's case shows that the Court failed to find any authority for its decision of the question of jurisdiction to pronounce cumulative sentences on convictions of several distinct misdemeanors, except in quotations made by Judge Allen from an argument used by you on the hearing some years ago of a case before that Court. These quotations are put forth virtually as an announcement by the Court that at the time of Tweed's trial you believed that the sentences of the Oyer and Terminer were without authority.

“Before pronouncing sentence in that case I gave to the subject a most elaborate and careful examination, and I failed, as the Court of Appeals have failed, to find in the books a single judicial or elementary authority adverse to the conclusion I reached, while numerous authorities of both kinds sustaining that conclusion, all of which the Court of Appeals have disregarded, were found and carefully examined.

“Considering your relations to the prosecution of Tweed for his frauds and crimes, I cannot help thinking that, although you were not directly or personally connected with that trial, it was your duty as a lawyer and a citizen, if you then entertained the opinion which the Court now seeks to attribute to you, to have put into my hands, when the subject was so long under consideration, the argument by which the Court of Appeals endeavors to justify its decision.

“You were not the employed advocate of any private or

public interest. You were known to be acting of your own volition, without any motive or restraint beyond such as your unbiased sense of honor and justice should have inspired, and therefore you were not affected by considerations which may sometimes induce Counsel, when engaged in forensic conflicts, to withhold views which they deem adverse to their own success.

"You could not have been unaware of the great respect which an argument of yours would have received from me, and, though I might not have concurred with its views, I feel that I was entitled to have had an opportunity to consider them. Without having been cited by any one, at any stage of the case, that argument is now brought forward by the Court of Appeals as their very spear and shield. Under the circumstances I think you will pardon me for asking why I was not permitted to have the light of that argument before me, and also whether you entertained at the time of Tweed's trial a belief that in pronouncing the cumulative sentences the Oyer and Terminer exceeded its jurisdiction.

"With the highest respect, I am, etc.,

"NOAH DAVIS.

"CHARLES O'CONOR, Esq."

REPLY OF MR. O'CONOR

"NEW YORK, *June 30, 1875.*

"HON. NOAH DAVIS :

"SIR,—The campaign against official malversation commenced through the Press in 1871, and mainly carried on by proceedings before the Courts, has now reached a point which demands earnest attention from the taxpaying and burden-bearing class. Courage always wins for a Rinaldo not only the admiration of his banditti, but a somewhat affectionate and not altogether undeserved loyalty. It is a controlling element of success, as the foremost delinquent has proven. Either in his own person or through a representative he has thrice bearded public justice in that high tribunal whose voice is law, and on each occasion has received its award that, as against him or his, the weapons de-

vised by the people's advocates were vain and hurtless. Bowing dutifully to the image of virtue which imagination may place in front of the justice-seat for the decent homage of its occupants, the learned Judges deprecate the possibility that atrocious robberies such as are imputed should ultimately go unredressed ; but in every case against the speculators a majority hold, with unvarying constancy, that the law forbids such a remedy as that then under review. 'Try again' is the implied advice ; and if the patience of the public prosecutor shall hold out, this generation may expect to witness throughout its allotted term, as a species of amusement, periodically recurring proofs how thick-witted the people's lawyers are, and how admirably astute, in the same uniform direction towards impunity, the Judges of the last resort are when dealing with speculators.

"It is a highly probable result, unless there shall arise among the suffering class a determined resistance to the power by which they are enthralled, and an inflexible resolve to reform existing abuses. For some years prior to 1871 the machinery of faction in this State was so organized that a certain not very respectable portion of each party co-operatively controlled the government. Increasing debt, increasing taxation, and numerous indirect devices for plundering individuals or masses constituted the quarry from which these co-workers drew their reward. Party differences were but a name. Just enough of party spirit was exhibited to color the pretended conflict of those who, controlling the visible movements of a nominal opposition, were in perfect accord as to the attainment of ends. These ends included great frauds, through public works upon the canals or elsewhere in the State, and enormous plunder, through numerous instrumentalities, in the metropolitan city. The managers were not in all respects alike. Nominally they differed in political opinions. There were other differences. Some were bold defiers of moral sentiment, who regarded success as a consecrator, robbed the public almost without attempting concealment, and lived in open violation of common decency ; others were sneak-thieves, who enriched them-



HON. CHARLES O'CONNOR



selves secretly ; still another class were contented with moderate pecuniary gains and the enjoyment of respectable positions, wherein, actually deceiving others, and possibly to some extent deceiving themselves, they exhibited a propriety of deportment which saved the government from fatal unpopularity. It was when this system had reached a vicious maturity that Samuel J. Tilden, in 1871, undertook the task of reforming the Democratic party, whose organization was then controlled by Tweed and his associates in New York, in alliance with certain speculators hailing from both factions, and residing in the metropolis or along the lines of the canals. The city men were, however, the real masters of the field.

“Mr. Tilden’s course and career form, in this connection, an interesting subject ; still only a brief reference will be made to it. Notwithstanding his unqualified demand for purity in administration, he seems to have retained his party relations. How he accomplished this object sufficiently to secure a nomination for Governor it is difficult for one of the uninitiated to comprehend. He did so, however, and he was elected. How knavery failed to make an effectual revolt during the canvass is another enigma. The spirit of satanic opposition which, tardily and late, reared its head against reform in the Assembly elected with him, and which then struggled so confusedly and ineffectually, is also a fit subject of study at this time.

“A glance at the names that, during the preliminary canvass, came into notice as his rivals for nomination to the Executive chair would be suggestive of pertinent inquiries. To the light derivable from these sources nothing need be added here. The Press has already made public all else that could be desired for some relevant and instructive calculations in the arithmetic of events. A general assault along the whole line occupied by speculators was not practicable in 1871, or at any time afterwards, until the advent of Governor Tilden to office in the present year. Legislation in the interest of reform, with a vigorous and inflexible Chief Magistrate to enforce it, was necessary, and this was

unattainable. What, if anything, has been effectively organized in this way during the present year remains to be seen.

"The frauds committed in New York having been discovered, thoroughly exposed, and remaining actually undenied, it was supposed, in 1871, that ordinary judicial remedies could be put in force against the perpetrators. The local Judges had, in most instances, received their offices through the favor of Tweed and his associates. Of course the lawyers who were charged with the duty of prosecuting for the public anticipated difficulties in the early stages of their suits; but they had no suspicion that like agencies had influenced the construction of the highest Court. They felt assured that in all cases against the robbers, whatever might happen elsewhere, the final judgment of that tribunal would be not merely in accordance with law, but that in pronouncing it the Judges would be animated by an earnest love of justice and an active zeal for its advancement. In this confidence measures were initiated. In the civil suits to recover the moneys fraudulently taken, it was quite impossible to secure that *animus* against the peculators which is always necessary to success, except by prosecuting in the name of the State; and, accordingly, that course being necessary, it was adopted. The circumstances were seemingly so favorable that the results must be regarded with surprise.

"Six millions of dollars had been literally stolen by means of County bonds issued in the form prescribed by what was called the Special Audit Act of 1870. (See Laws, page 878, section 4.) This was made the subject of an action by the State against Tweed, Ingersoll, and others. Another like fraud, perpetrated by one Thomas C. Fields, Attorney for the City Corporation, and member of Assembly, through an issue of City bonds not authorized by any law, and amounting, with interest, to about \$500,000, was prosecuted against that person. This was also in the name of the State. A brief account of these test suits and of their fate may be useful.

"All now admit that the \$6,000,000 theft under the Special

Audit Act could not have been sued upon by the City Corporation. There was, however, within the city a local entity of very narrow and limited powers called the County, whose investiture with corporate functions was never needful and was the result of inadvertence or of some evil design. It had never brought a suit, and it never had been successfully sued. That it should be the plaintiff was a point which, under the circumstances, would naturally have suggested itself to any desperate litigant who had no defence on the merits. It should be added that this very peculiar entity had never been legally entitled to a cent of money or to property of any sort, except by some express statutory grant made to it. If it could create a debt or incur a liability or be sued, it had no property that could be levied on. It was, however, an official machine put in motion from time to time by special enactment to impose a local tax for some specified use or purpose ; and there was in the Special Audit Act, as subsequently modified, an authority to impose such a tax for the repayment of those who should advance money on these special audit bonds. That authority was, in fact, irrevocable, for the Supreme Court of the United States, when needful, would compel the County officers to levy the tax. When the theft was perpetrated and public justice demanded a legal remedy against the thieves, this corporate entity called the County had, in law and in fact, no shadow of concern with the matter, except the liability of its officers as the State's taxing agents, to be put in motion for the benefit of the bond-holders. If the thieves had repented and redelivered the stolen money to the County officers, no lawful disposition could have been made of it except by the State Legislature. Never in any shape—in substance, in terms, or in intent—had any part of this money been granted to this entity called the County. Raised for no purpose but immediate payment to the fraudulent holders of the false audit certificates, it could not lawfully be applied to any other purpose. The bond-holders were reimbursable, not by the County, not by its people or inhabitants, nor by any one save and except only the future unknown and as yet unas-

certainable taxpayers, under a levy to be made for this special purpose. It could not be proved that one of these future taxpayers was yet born when the theft took place or when the suit was brought. The only persons injured were this future unknown and unascertainable class. All the judicial opinion ever appealed to, including that of the Court of Appeals itself in this very case, expressly declares that this local entity called the County was not the representative of that class. It seemed to the people's Counsel that the State represented them, and was the proper plaintiff to sue in their vindication. But in the suit against Tweed and Ingersoll the Court of Appeals (Judge W. F. Allen delivering its judgment) held that the County alone could sue, and allowed Ingersoll's demurrer, thereby discharging him from the suit. A lucid, decisive, and fully reasoned opinion to the contrary was delivered by Judge Rapallo, in which Chief-Justice Church concurred. Subsequently to the first argument one of the learned Judges departed this life, and, besides a temporary appointee in his place, Judges Folger, Andrews, and Grover concurred with Judge Allen. This constituted a majority, and judgment passed against the State. For the present this brief summary must suffice. A critical examination of Judge Allen's opinion cannot be conveniently presented to the jurists of our country until the judgment shall have appeared in the regular reports.

"This was the speculators' first triumph. The second should also be stated. It was in a case which presented other features, but no complexity. The question on which the Court and the State's advocates differed was simple in the last degree. It will be perfectly intelligible to every tolerably instructed jurist in Britain or America. It is difficult to find an excuse for the party that erred. The material facts can be stated in a few words. An act was passed in 1870, which, as construed by all the Courts, authorized Comptroller Connolly to issue bonds of the City Corporation for a certain purpose to the extent of \$50,000. Connolly issued bonds for ten times the amount, and paid the proceeds to Fields. A suit was brought against the latter

by the State for this unlawful disposal of the public moneys. Lawyers will understand the grounds of a difference in the practice from that adopted in the first suit. The City Corporation was made a co-defendant with Fields, the complaint alleging that its officers fraudulently colluded with Fields, the receiver, and neglected to prosecute for the money. Judgment passed by default against the City Corporation, and a recovery by verdict was had against Fields. On his appeal to the Court of last resort this judgment was reversed. Judge Folger delivered the opinion. It concurs in all the positions of the State's Counsel, save one. Admitting the original wrong as alleged, admitting that the fraud and collusion of the city officials were fully established for all necessary purposes, and further admitting that the judgment in that case, if permitted to stand, would protect Fields from any claim by the City, he held, nevertheless, that the State could not sustain its recovery. The same Judges who concurred in the Tweed - Ingersoll case concurred in this opinion, and made it a judgment. There has been no intention to criticise it. As a judicial and literary performance it is without a blemish deserving serious notice, unless there was error in the conclusion. The point was fully and fairly met and directly decided. Jurists skilled in the common law throughout the world need only to be told that in this State legal and equitable remedies are allowed in the same procedure. They will pronounce upon this decision. It was the second triumph of speculation.

“Whatever may become of these two decisions, the third is likely to live in story. It forms the precise subject of your inquiry. William M. Tweed was accused of fifty-one misdemeanors in as many separate counts of one and the same indictment. He was tried for them all at once, and convicted of them all. The trial was had in a Court of Oyer and Terminer, held before you ; and several successive or cumulative sentences were pronounced against him for these offences, amounting in the whole to twelve years' imprisonment in the New York Penitentiary, with fines amounting to \$12,750. For a single offence of this sort the

utmost punishment allowed by law is one year's imprisonment and a fine of \$250. Tweed spent a year in prison, paid to the proper receiver \$250, and then sued out a writ of *habeas corpus*, claiming to be discharged. After decisions against him in the subordinate tribunals, his case came before the Court of Appeals, and, as usual, peculation was triumphant. He was discharged. And here we enter upon a view of the circumstances which give this event a deep interest. As above remarked, Tweed's government had quite too much influence in the New York local tribunals to admit of success in criminal prosecutions at the outset of the campaign against official swindling. But time and persistent effort wrought changes. Some of the local Judges were impeached, and by their compulsory resignation or disqualifying conviction, together with the destruction of Tweed's control over the ballot-boxes, the local Judiciary was changed. Events are approaching which will guide intelligent opinion in the inquiry whether it was completely purified or still needs expurgation through the impeaching power, four-fifths of which will soon be elected. Other Judges were chosen by the people in the belief that they would administer justice. Among these was yourself, and none will deny that in trying the indictment against Tweed you faithfully, diligently, and honestly endeavored to perform your duty.

"But it is said by the Court of Appeals that, however just and legal it might have been to inflict them on as many different indictments, these successive punishments should not have been imposed in a single case and under one indictment. Your integrity and love of justice are not questioned, but you are said to have violated law. The highest Court has pronounced you just, but not learned or wise. Honest, but not able, is the sentence retorted upon you by the liberated malefactor's friends. They exclaim in triumph that you are subject to public humiliation, and that your judicial reputation has received a blow. It is confidently asserted that the judgment of the profession at large anticipated that of the upper Court, and pronounced your action errone-

ous. That high Court has tendered one evidence of this. It has condescended to accept, adopt, and promulgate, as aptly expressing its own, my opinion against the practice pursued by you at the trial. That citation has forced upon me the duty which I am now performing.

“The judgment of the Court of Appeals was not pronounced on a writ of error brought to review a decision by which Tweed was compelled, against his objection, to acquiesce in a hearing of all these charges at one time. It was a determination that no tribunal in this State has power to try and punish a defendant for several distinct and separate offences under one indictment. Even though the defendant should acquiesce in the union of several pending accusations against him in one trial, and even though he should prefer that course, as he well might under some circumstances, it is decided, as a matter of jurisdiction, that there must be a separate indictment and trial for each separate offence which is to receive the full punishment. Nay, more; the settled forms of pleading, which are the best evidence of the common law, allow numerous counts in the same indictment, and require each count to allege a separate and different offence; yet it is held, in effect, by the Court of Appeals, that if, by separate pleas to each count of an indictment thus framed, a defendant should confess his guilt, still the Court would have no jurisdiction to impose any greater amount of punishment than that prescribed for one offence.

“This decision draws after it many serious inconveniences. Some of them may be adverted to. If there was no jurisdiction to adjudge against him confinement beyond the term of one year, the detention of Tweed in the penitentiary during the last five or six months was altogether unlawful. A civil action in tort will lie against every one concerned in it for such damages, remunerative or vindictive, as a jury of twelve men may see fit to award in the exercise of their unlimited discretion. In this predicament are included the Warden of the Penitentiary, yourself (the Judge), the clerk of the Court, the Counsel who moved for the sentence, and many others. Indictments would lie, and each of these per-

sons might be put to an appeal for Executive clemency as his only relief from a doom to the occupancy of Tweed's vacant cell in the penitentiary. Had some one not affected by the Tilden *animus* been nominated and elected to the Governorship after the peculator's first judicial triumph—an event not then deemed impossible—the chances of these well-meaning but misguided delinquents to escape the vengeance of peculators' law might be less perfect than it is as things have turned out.

“Another circumstance deserves notice. After the full year had elapsed, our venerable Governor Dix, indignant at the favoritism which screened Tweed from the punitive treatment dealt out to common offenders, took measures to compel a more rigorous course. The sharp rebuke contained in his letter of November last will be remembered. Thus it may appear that he also brought himself under the lash of that law now announced by the Court of Appeals. Let not these suggestions be deemed visionary. On the 23d inst., the day succeeding Tweed's deliverance from the penitentiary, the following announcement was made in a city journal whose area of circulation is the whole civilized world, and whose credit as a chronicler of current events and of the various sentiments of classes is equally extensive :

“‘TWEED'S CHANGE OF RESIDENCE

“‘A release from Blackwell's Island, to be immured the same day in Ludlow Street Jail, may seem no gain ; but it is really a great one, all things considered. Tweed has not recovered his liberty, but he has put off the degrading striped dress of a convict criminal. He is no longer subjected to compulsory labor, no longer forced to eat the food doled out to felons, and sleep in a narrow cell, but is allowed to dress as he pleases, to select any diet he can pay for, and to employ his time according to his inclination. He also enjoys whatever grim satisfaction there may be in the public humiliation of the Judge who pronounced his illegal sentence, and who has been compelled by the unanimous decision of the Court of Appeals to sign the order for his

release. Revenge is sweet, and besides enjoying this blow at Judge Davis's judicial reputation, Tweed has probably revolved in his mind the question of exacting satisfaction for that part of his imprisonment which the highest tribunal of the State has declared to be illegal. Tweed enjoys the change as he could not if it had been the effect of Executive clemency. To be set free by the law is a very different thing from a pardon, and the fact that his Counsel have been so successful in the great matter of getting his heavy sentence annulled encourages his confidence in their future efforts in the new suits. It is, therefore, idle to assume that Tweed does not think himself better off than he was in his convict's suit on the Island.'

"So far as that article might be thought to imply on your part censurable motives or detected ignorance, it does not express the journalist's belief, nor was it intended to be so understood. It was merely designed to exhibit prominently in the editorial column the common sentiment and public bragging of the great peculator's friends. In the news column of the same and the following day the public are informed, in their chaste phrase, how Davis had been forced by the Court of Appeals 'to eat his words.' We thus find, as a consequence of the peculator's third triumph in the Court of Appeals, that you, sir, can escape the loss of your estate in damages only through Tweed's forbearance, or that of a partial jury. You, as well as Governor Dix, and nearly all who have been actively moved by hostility to Tweed's speculation, can only avoid taking his place in the penitentiary through some similar indulgence. One point, more important than all these in every true man's estimation, affects you. You must submit to mental humiliation. You go down in your judicial history stained with the imputation of having been led into illegal oppression by ignorance. At least, this is so unless you can be vindicated at the cost of others. This is not a pleasant issue.

"Let us then see how this matter of the cumulative sentences stands as between yourself and the Court of Appeals.

That high tribunal, by Allen, J., among other things, thus argues in support of its judgment :

“Eminent Counsel claim, with great plausibility and show of reason, that the rule permitting the trial of a person on several offences at the same time is not authoritatively established, and that it ought not to be so. I cannot do better than to quote literally from the brief of Mr. O’Conor above referred to, and adopt his language, for the reason that he very clearly and tersely expresses the position and the arguments in support of it, and which I deem worthy of consideration. That eminent jurist, after referring to the analogy between civil actions for penalties and criminal prosecutions, says : “And accordingly, except under some statute expressly authorizing such a course, it has not been the practice to allow two distinct offences to be tried at the same time, either by indictment or penal action. Besides the confusion and embarrassment in which a trial at one time for many offences would involve the accused, such a practice, if tolerated, would break down and utterly obliterate many principles of law that are not only well established, but essential to the safety of the citizen. Nothing is better settled than that the evil reputation of the accused shall not be offered to strengthen the proofs against him. That other misdeeds shall not be alleged, proved, or attempted to be proven, is equally well-known law. If the public prosecutor or a common informer in a penal action could put an unpopular person on trial for every delinquency imputed to him by common fame, such a one (however innocent) might often sink under the weight of unmerited opprobrium. The usage of employing numerous counts to guard against a possible variance between the allegation and the proof is the sole cause of any misapprehension concerning this matter which may appear in some few judicial opinions. Because there may be many counts in an indictment or declaration, and each on its face must be for a different offence, it has been hastily assumed that distinct and different transactions occurring at different times and places, and constitut-

ing so many different offences, may be given in evidence on the trial of an indictment or a penal action. The few cases that are to be found giving an apparent sanction to this notion are not sufficient to establish it."

"The learned Counsel, with his usual acumen and discrimination, reviews the cases in a note to the brief, and shows that his position is not without foundation, and I incline to concur with him in opinion. His arguments appear to me unanswerable."

"There was a pungency in this citation. A lawyer, not suspected of favoring speculators, is shown to have condemned, with 'unanswerable' force, the practice adopted against Tweed. Whether the learned Court was happy in this editorial performance may be best determined by a comparison of this extract with its own action in judging of the same precise point a very short time previously.

"My argument thus cited against your action was delivered before the Court of Appeals in the case of *Philo Johnson v. The Hudson River Railroad Company*, in September, 1871. The plaintiff had sued for and recovered in one action 526 penalties of \$50 each for as many different offences of the same kind. (2d Sweeny's Reports, 314.) An appeal was taken to the Court of Appeals, and the entire judgment was there reversed on the merits, without any reference to the question whether a party could be tried for numerous delinquencies at once and subjected to numerous penalties in the same action. Judge Rapallo, while at the Bar, was of Counsel for the defendant, and, of course, he took no part in the hearing on appeal. I argued the case in the upper Court. It never has been, and is not now, suggested on any hand that, as it respects this point of joining several offences and punishments in one trial and judgment, there is any difference between penal actions and indictments. In principle there is none; all the authorities plainly show it, and it is on that account alone that my argument, thus cited by the Court of Appeals, had any relevancy to its decision.

“Although it turned out not to be necessary to an actual decision in the Johnson case, or perhaps in any other, the point was relevant in many suits then pending on appeal, and it is presumable that this very argument was urged upon the Court by other Counsel in these other cases. However this may be, the Appeal Judges, as we shall see, considered it, and finally disposed of it. On December 12, 1871, while the Johnson case was yet under advisement, *Fisher v. The New York Central and Hudson River Railroad Company* (46 New York Reports, 569) came up and was decided. Judge Grover, in delivering the opinion of the Court, spoke as follows :

“‘This makes it unnecessary to determine whether, if several penalties are recoverable, they can all be recovered in one action, or whether a separate action must be brought for each penalty. I dismiss this part of the case with the simple remark that, irrespective of what was the early common-law rule, or how the question as an original one should be determined upon principle, the rule has been too long considered settled and acted upon in this State, that they can all be recovered in one action, to permit any departure from it by this Court.’

“Of course, Judge Rapallo declined to vote, and he stated the reason. We have seen that he was ‘interested in the question as Counsel.’ This very declinature, eminently proper as it was, lends force and point to this statement, if either was needed. It shows how distinctly the question was brought under the notice and consideration of the Court. Chief-Judge Church and Judges Allen and Folger are expressly named as concurring with Judge Grover. Thus, for the guidance of Counsel, prosecutors, and inferior Courts, the rule permitting the infliction of numerous punishments for delinquency, through one trial and judgment, was declared to be perfectly established—so completely, indeed, that the Court could not ‘permit any departure from it.’ The volume of State Reports announcing that the ob-

jection had thus received its quietus was published on May 20, 1872. Scarcely eighteen months had elapsed after that date when, on Tweed's trial, you applied the 'rule' thus prescribed to you. Had any one then read to you my brief in Johnson's case, as persuasive evidence of the law, it must be presumed that you would have promptly referred to Fisher's case. You might have added, 'If that argument cannot be answered it can be overruled. The deliberate opinion of the highest Court in the State is against it. Whatever I might think of its legality, the rule laid down by that Court controls me, and I must obey it.' Had you not followed the rule so recently proclaimed you might have been pronounced inexcusably ignorant of it, or justly censured for insubordination.

"Whether the doctrine so recently and so emphatically repudiated should have been at once approved and adopted when its effect was to open the prison doors and exempt a speculator from penalties, the Appeal Judges may answer as they best can. It is not the question propounded to me. The dates show that my argument, however irrefragable, was before the Court, and was repudiated by it when Fisher's case was decided. Of course, I did not believe when Tweed was tried that you would have treated that argument as valid. You asked whether I supposed that the Court of Oyer and Terminer was exceeding its jurisdiction when you proceeded to impose the cumulative sentences. The above-recited utterance of its views by the Court of Appeals, in deciding Fisher's case, forbade my regarding that act even as an irregularity or an error. The notion that it was an excess of jurisdiction never found place in my mind even for an instant. There does not seem to be any color for it. Had the Court of Appeals entertained this point anew upon a writ of error brought by Tweed, and, after duly reconsidering its former conclusion, reversed it, I, at least, might have been well satisfied. Doubtless I would have been as much flattered as surprised. Public justice could not have suffered any material prejudice, nor would crime have been furnished with immunity. The only con-

sequence would have been a new trial, conducted in conformity with the altered views, more enlightened than those expressed in Fisher's case, which fuller reflection or abler arguments had generated in the minds of the Appeal Judges. But by changing their opinion, and carrying the point to a denial of jurisdiction, they have let in great practical mischiefs. Some of these have been already noticed; practically, the most serious is the complete deliverance of the culprit from any punishment for fifty crimes of which a jury has pronounced him guilty. The judgment stands unreversed and in full force, though the penalties are remitted; and if prosecuted for any of these fifty unpunished delinquencies, he can now plead, as an effectual bar, his former conviction. The decision that the joinder, found by the Court's new lights to be erroneous, affected the jurisdiction, and was, therefore, reviewable on *habeas corpus*, will not be approved by the great body of enlightened jurists, whose scrutiny its importance will naturally invite. They will not be apt to recognize in it any other merit than consistency, nor any consistency except that which may be discernible in its similitude to the two former judgments of the same tribunal in the civil cases. If it be true, as alleged by the delinquent's party, that all those who constituted the minority in the former cases have joined themselves unto the other four, so that unanimity now reigns within the Court, the fact is to be regretted. It presents an exigency which should be met. Unanimity in seeking a remedy should prevail. Neither the pecuniary interests of our citizens nor the honor of our State can be deemed safe as matters stand. But we now have an Executive opposed to peculations, and in November an entirely new Legislature is to be elected. What is yet unstolen in the hands of the people may be preserved to them if they will act promptly, and employ for their own rescue the means which are in their hands.

"Yours respectfully,

"CHARLES O'CONOR."

LETTER OF GEORGE F. COMSTOCK

"To the Editor of the Tribune:

"SIR,—The relation which I happened to hold to the *habeas corpus* case of William M. Tweed, recently decided by the Court of Appeals, seems to me to render it proper that I should submit a few observations upon the published letters between Judge Noah Davis and Mr. Charles O'Connor. Under the highest sense of professional obligation I accepted from the prisoner a retainer in the belief that the law of the land had been grossly violated in the accumulated sentences pronounced upon him, and it became my duty to give to the case a long and laborious examination. While other members of the Bar can, and no doubt do, keenly appreciate the insult to the Bench, the more exact knowledge of the case which I possess may perhaps better qualify me to make some statements and suggest some views intended, and I may hope calculated, to remove the impression, if entertained in any quarter, that the highest judicial tribunal in the State is not entitled to the fullest confidence of the public.

"The correspondence between the two gentlemen named is certainly most remarkable.

* * * * *

"Certainly, it is always possible that the decision of the lower Court may have a sounder basis in law than the judgment of the appellate Court which reverses it. But appellate Courts are a part of every respectable system of jurisprudence, and they are necessary on account of the uncertainty sometimes of the law itself, and the far greater uncertainty of its application to the ever-varying combinations of fact in human affairs.

* * * * *

"He [Tweed] was charged with neglect of official duty, or a bad performance of official duty, as auditor of certain accounts—an offence for which the maximum imprisonment prescribed by law was one year. The punishment in its accumulated severity was more than twice greater than the

law would have tolerated if he had been guilty of the larceny of forty millions of money. And yet there was not in the whole record a single charge or suggestion that the accused had been guilty of larceny, embezzlement, or receiving improperly in any form a single dollar of the public money. * * *

"This is not an occasion for a dry and technical discussion of the question which the Court of Appeals has determined. That duty has been performed in its appropriate place. But laymen and lawyers alike can understand the overwhelming force of the argument derived from universal and immemorial usage in this Commonwealth. We have been an independent State for about one hundred years, with a jurisprudence of our own, and we have hundreds of volumes of reported cases. There is no record of a criminal prosecution in which distinct offences have been united, tried, and punished under a single indictment. The oldest man at our Bar has never known or heard of such a case. There is no tradition of such a case. It remained for Judge Davis to attempt the introduction into our law of a principle so alarming, so full of real danger to the rights of every citizen. And this is the kind of justice which Mr. Tweed (in Mr. O'Connor's language) 'bearded' by appealing to the high and distinguished tribunal chosen by the whole State to hold in even balance the scales of justice and pronounce the same rules of law for sinners and for saints. * * *

"I have less to say of Mr. O'Connor's letter. Its sharply cut sentences, its pungent paragraphs, and its general tone of denunciation may be put aside as of no account. Its grand purpose is an assault upon the Court of Appeals, the sole grounds of the attack being, first, the decision of the Court adverse to the civil action conducted by the assailant in the name of the people of the State for the recovery of moneys alleged to belong to the taxpayers of the city of New York ; and next the decision on the *habeas corpus* case of William M. Tweed, adjudging that all the accumulated sentences imposed by Judge Davis at the trial were void.

"As I have never given my time or my thoughts to an

examination of the first-mentioned case, it would be presumption in me to express my opinion in regard to it. I can see that the question was a grave one, and that its solution was not without its difficulties, because the Judges themselves were divided in opinion. It was decided in accordance with the judgment of the Court below, and I accept the decision as the law of the land. No further observation seems to be called for, except to say that I have heard many expressions of professional opinion, and that they happen to have been uniformly in accordance with the decision of the Court.

“As to the Tweed *habeas corpus* case, it is a circumstance of great significance that Mr. O’Conor in the whole course of his letter nowhere ventures upon an opinion that the accumulated punishment inflicted by Judge Davis could be sustained upon any legal principle. He does, however, intend to say, if I correctly understand him, that the error, which he seems to concede, was remediable by a writ of error only, a proceeding which would result in a reversal of judgment and a new trial, and that it was not remediable at all under the writ of *habeas corpus*, the successful result of which was the discharge of the prisoner without any new trial for the same offence or offences. On this point I must take a direct issue with Mr. O’Conor. I think it presented the chief difficulty which the case had to encounter in the Court of Appeals, and the favorable judgment of that Court was won not only upon clear principles, but by the citation of precedents and authorities in such number and of such great force that no Court in which law is decently administered could disregard them. This is a question to which Mr. O’Conor does not pretend to have given a special examination. I will take his opinion with the most profound respect after he has made such examination in the light of the authorities, with an easy reference to which I will cheerfully furnish him. Until then it would be becoming to withhold his abuse of a high tribunal, which has carefully and laboriously considered the question and decided it.

“In reference to the broader question, whether the accumulated sentences under review were sustainable in accordance with the settled rules of law, Mr. O’Conor appears to be greatly incensed that the Court of Appeals should have quoted in support of the decision his own brief in a prior case, and he alleges that the same Court overruled his brief in still another and later case. This is altogether a mistake. In the only portion of the brief quoted by the Court of Appeals it was asserted in substance that no man could be tried and punished for more than one crime under one indictment. In the subsequent case it was expressly adjudged that, according to the terms of a certain statute, only a single penalty had been incurred, to be recovered in a single civil action. Judge Grover, in pronouncing that as the judgment of the Court, casually remarked that it was unnecessary to decide whether, if several penalties had been in fact incurred, they could all be recovered *in one civil action*, expressing the opinion, however, that they could be. The judgment of the Court in the actual case before it having determined that only one penalty was recoverable, how could the mere dictum of a single Judge decide that in some other conceivable case more than one could be recovered? It scarcely requires a lawyer to answer so plain a question.

“But the want of analogy between civil and criminal suits is too striking to escape observation. Once establish the principle that under one indictment more than one offence may be tried and punished, and the same rule must be carried through the whole field of criminal jurisprudence. You cannot arrest the sweeping influence of this pernicious principle. The administration of the law must run into the wildest extravagance, the right of challenge must be subverted, and all the safeguards of liberty and life must be thrown to the winds. To this great question the Court of Appeals gave its patient and laborious attention, and its decision, rendered under all the circumstances and surroundings of the case, will, as I believe, establish more firmly than ever the public confidence in the learning,

the independence, and the uprightness of that high tribunal.

"Enough has been said, I trust, to show the utter groundlessness of this assault upon that Court, and I have little else to say. I have long known Mr. O'Connor, and have long been accustomed to think of him with all the respect which is due to eminent talents and unsullied purity of character. His best friends, among whom I wish to be reckoned, must deeply regret the step he has taken. Most profoundly do I regret it. But I remember that the greatest and best of men have sometimes great faults. If Mr. O'Connor has such, they are only the spots on the shining orb of the sun. If I might venture a word further, I should say: Alas! with all his admirable qualities, he is despotic and intolerant. Woe to the luckless wight who stands in his way! Woe to the Judges who presume to decide against him in a case which he has nursed and upon which he has bestowed his affectionate regard!

"GEORGE F. COMSTOCK.

"SYRACUSE, *July 22, 1875.*"

To the present generation and to those who were not acquainted with Mr. O'Connor it must seem strange that he should with such virulence assail the Judges of the highest Court in the State of New York. That Court, by reason of the great learning and ability, as well as integrity and impartiality, of its Judges, was second to no State Court in any of the States of our Union, and was scarcely second to the Supreme Court of the United States. In the Ring cases Mr. O'Connor had maintained his original and bold legal propositions with such powerful arguments that he seemed so to overawe judicial tribunals as to sweep all before him, until he reached the Court of last resort. Success in these cases, with Mr. O'Connor, was to be the crowning glory of a long and illustrious professional career. After achieving success all along the line in his professional warfare, to have vic-

tory at the last moment snatched from him, even by a high and dignified Court, was more than he could bear. His patience was exhausted; his self-possession gave way; and of fortitude he had none. In some respects Mr. O'Connor's intellectual "make-up" was unprecedented. Some of his mental traits were startling and incomprehensible. We can understand how a lawyer of small mental caliber, of superficial acquirements, may become so absorbed with his side of a case as to look upon an adverse decision of a Court as a personal affront. But why Charles O'Connor in his *greatness* should have been infected with such *littleness* is a psychological mystery which mortal man can never solve. One is almost tempted to say that at one and the same time Charles O'Connor was the *greatest* lawyer in America, and the *smallest* lawyer in Christendom.

This was by no means the only occasion on which Mr. O'Connor had shown that however much he might respect a lawyer who would *argue* against him, he had no respect for a Judge who would *decide* against him. In the case of Horace F. Day against the New England Car-spring Company, tried in the Circuit Court of the United States for the Southern District of New York in 1854, Mr. O'Connor, who was Counsel for the defendant, assailed the presiding Judge (Betts) with extraordinary bitterness because he decided against him in respect to the admission of certain evidence after he had patiently listened to an argument from him of several hours' duration. The trial lasted forty days, and was then brought to an abrupt conclusion by the death of one of the jurors. Mr. O'Connor refused to go on with the other eleven jurors. After the trial had thus ended Mr. O'Connor addressed the following letter to James W. Gerard, which was published in the New York *Herald*, August 2, 1854:

“IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK

“*Horace H. Day v. The New England Car-spring Com-
pany*

“Early in July, 1853, Horace H. Day became assignee of all the then subsisting interest of Edwin M. Chaffee in the extension of a patent granted to said Chaffee. The defendants had used the patented improvement subsequently to such assignment, and this action at common law was brought to recover damages for such uses as an infringement. The defendants set up in their defence a certain agreement in writing between Chaffee and one William Judson, dated September 5, 1850, and a license to the defendant made by Judson, professedly under and in pursuance of the powers vested in him by the said agreement. The cause was tried before the Hon. Samuel R. Betts, District Judge, and a jury. In the progress of the case it was asserted by Counsel that the instrument dated September 5, 1850, was not duly sealed by Chaffee. But before any doubt was suggested as to that fact, and after the subscribing witness had sworn that Chaffee, when of full age and sound mind, laboring under no incapacity, with full knowledge of the contents of the paper, had, knowingly and intentionally, sealed and delivered the same as his act and deed, the following question arose upon the trial: The plaintiff proposed to prove by oral testimony of witnesses that Judson was the attorney of Chaffee in procuring the extension; that in order to induce Chaffee to consent to and execute the said agreement, he had threatened unjustly to harass and vex him with suits at law, and to cause him to be turned out of employment, and had made divers false and fraudulent representations touching matters of law and fact to him, with a view to deceive and defraud him (said Chaffee), and induce him to consent to execute said paper, and become a party thereto.

“There was, of course, no pretence that the case came within the Revised Statutes of New York, Part 3, Chapter

7; Title 3, Article 8; 12th Howard's U. S. Reports, 361 to 367—or that the New York Code of Practice was applicable.

“The Counsel for the defendants objected to the said evidence on the ground that an agreement in writing, under seal, could not be impeached in an action at law between privies—such as the present action was conceded to be—by any such evidence; that upon the trial of such a case before a jury such evidence was wholly inadmissible for the purpose of vacating, annulling, or impairing the effect of the agreement, and that the only mode of obtaining that kind of relief upon such testimony was by bill in equity.

“But the Judge said that of common right, fraudulent representations (though not in any wise affecting the fact of due execution), and by which the party was deceived and induced to execute an agreement under his seal, might be proven by parol before a jury in an action at common law, for the purpose of avoiding the agreement, to the same extent as in equity; and that, if satisfactorily proven, they would render the agreement void at law. And he accordingly ruled that the evidence so offered by the plaintiff was admissible.

“The learned Judge premised this decision by calling the attention of the jury to his remarks. He also referred to the great and unusual length of time which had been consumed in the argument of this incidental point, and stated that the principle announced in his decision and the practice under it were so familiar that he did not doubt but that a decision to the same effect could be found in every volume of Johnson's Reports.

“Now, my dear sir, having been the Counsel who alone argued the said points for the defendants, and having occupied about four out of the six or seven hours which were devoted to its discussion, I am constrained to regard the remarks of the learned Judge as involving an impeachment of my personal and professional character. His Honor's statement clearly imputed gross and inexcusable ignorance upon a point with which every law student of a year's stand-

ing should be familiar, or a perverse and wilful waste of valuable time in urging at great length an objection which was sure to be overruled by any Judge of ordinary learning and experience. Therefore, to vindicate myself as far as practicable from such aspersion, I hereby deposit with you my check for one thousand dollars, payable to your order, which I authorize you to indorse and deliver to Mr. George Betts, if at any time within six months from the date of this letter he shall produce you any one of such decisions in any volume of Johnson's Reports, or if he shall produce to you a certificate in writing from any of the under-mentioned persons that there is one such decision in Johnson's Reports, or that, in the opinion of the writer of the certificate, the aforesaid opinion and decision of Judge Betts were conformable to law. The persons, any of whom may give such a certificate, are as follows : The nine Judges of the Supreme Court of the United States, the four Judges of the Court of Appeals of this State, the five Judges of the Supreme Court in this District, the six Judges of the Superior Court, the three Judges of the New York Common Pleas, and the Judges of the District Courts of the United States for the respective Districts next adjoining this District.

"If this offer was made to the author of the decision, it might not be deemed entirely respectful to the Court, and therefore it is made to one who, both from his relations to the learned Judge and from the circumstance of his being of Counsel for Mr. Day in some of these India-rubber controversies, will feel a natural and proper readiness to vindicate the correctness of the decision.

"If the point were not as familiar as the learned Judge himself stated it to be, and as every lawyer of any experience will admit it to be, it might be improper to suggest a reference to it in this form to any judicial person ; but when a useful purpose may be served thereby, I presume a Judge may, without impropriety, certify the existence of any of the common legal truisms which are universally known and admitted by the Bench and Bar.

"It may not be amiss to add, as an additional reason for

this conclusion, that his Honor's decision cannot come under consideration before any Court of review, as no verdict was rendered in the case.

"I am, my dear sir,

"Yours respectfully,

"CH. O'CONOR.

"TO JAMES W. GERARD, Esq.

"July 20, 1854."

The following is the reply of George F. Betts to the above letter of Mr. O'Connor:

"NEW YORK, August 4, 1854.

"To the Editor of the *New York Herald*:

"I was somewhat surprised to see in the *Herald* of the 2d inst. the signature of Mr. Charles O'Connor to a letter offering to me a wager of one thousand dollars, and announcing that the money had been actually put up and was in the hands of the stake-holder, Mr. Gerard.

"The endeavor to appeal from a judicial decision to a newspaper controversy to sustain a professional opinion by a bet, and the assault made publicly upon a father addressed to the son, all were matters of surprise. It could scarcely have been expected that such a peculiar position before the public should have been taken by one enjoying so high a professional reputation and social position, who professes to be a gentleman, and in whose veins flows the blood of ancestral Celtic kings—a lineage publicly claimed by discarding the plebeian name of O'Connor for the regal O'Conor. But though the lawyer, or the gentleman, might in the petulance of offended pride temporarily forget himself thus far, no man but one whose loins were barren and his home childless could have so far violated the sanctity of the relation of parent and son, and the obligation of filial honor that results from it both by nature and God's commandments, as thus publicly to point to the son the father's fault, if fault there had been. If Providence should grant to him, as to the patriarch of old, a son now in his age, he will per-

haps appreciate the sweet courtesy of an attempt to imbue the mind of that son with prejudices against him, and to diminish that filial love and reverence he would then deem his due.

"Although the high standing and influence of Mr. O'Connor may control public opinion to a great degree, I scarcely believe that this attempt made by him to ingraft upon legal arguments the mode of decision heretofore peculiar to the prize-ring and the cockpit will fail to change what I deem to be a healthful and settled public sentiment. That public sentiment is in accordance with my own feelings and sense of propriety, and I must therefore decline to enter into a public discussion for a wager, as he proposes. And, apart from any personal feelings, I never could consent that the decisions of a Court should be made the subject of a gambling discussion, that men should stake their money upon them as they would upon a sparring-match or a bear-bait. If such is henceforth to be the mode of discussion, it must be without my aid as one of the disputants. I cannot accept either Mr. O'Connor's bet or his bounty; and, while that wagering offer remains, I must therefore refuse any participation in a discussion which that circumstance renders, in my judgment, disreputable.

"But it is due to Judge Betts, in his absence from the city, to state that I have no satisfactory information that those points arose and were decided which are set forth in Mr. O'Connor's letter. The Judge's remarks, as printed, stated the points very differently, and as I took no part in the trial personally, and was not present when the point arose or was decided, I addressed a note to Mr. Stoughton, the senior Counsel for Day upon the trial, asking for information as to the accuracy of Mr. O'Connor's statement. I annex his answer, from which it will be perceived that he differs entirely from Mr. O'Connor in his views of what propositions of law were laid down by Judge Betts. I have no information except from those sources what his decision was. I entertain no doubt that the proposition stated by Mr. Stoughton, and that printed in the Judge's remarks, are

sound in law, and those are the only points that I can admit, without further information, to have been ruled by the presiding Judge.

"Your obedient servant,

"GEORGE F. BETTS."

The following is the letter of Mr. Stoughton referred to in the letter of Mr. Betts :

"NEW YORK, *August 3, 1854.*

"GEORGE F. BETTS, ESQ. :

"MY DEAR SIR,—I have received your note of the 2d inst., calling my attention to the letter of Mr. O'Connor to J. W. Gerard, Esq., published in the morning *Herald* of that date. You inquire of me whether the point as therein stated actually arose, and was decided by Judge Betts upon the trial of the case of Horace H. Day against the New England Car-spring Company in the Circuit Court of the United States.

"I have read the letter to which you refer. I recollect the circumstances under which the points therein referred to arose. They were as follows : The object of the suit was to recover damages for the infringement by the defendants of a patent granted to Edwin M. Chaffee, and by him assigned to Mr. Day in July, 1853. On the part of the plaintiff, the issuing of the patent to Chaffee, its transfer to Day, the value of the invention, and its use by the defendants had been proven; and thereupon their Counsel, among other defences, sought to establish that by an agreement between Chaffee and Mr. William Judson, dated September 5, 1850, the latter became either the owner of the patent in question, or vested with authority to license the defendants to use the improvement, and that he did so license them before the transfer of the patent to Day. To establish these defences, it became necessary for the defendants to prove the execution of this agreement by Chaffee. It purported to have been executed under his hand and seal in the presence of George Woodman, whose name appeared thereupon as subscribing witness. Although it is a well-settled rule

in the law of evidence that where the execution of an instrument attested by a subscribing witness is to be proven, he must be called for that purpose; and although Mr. Woodman was present in Court, attempts were made and continued by the defendants' Counsel, through several days, to establish the execution of the agreement by other evidence. These attempts were opposed by the plaintiff's Counsel, who believed that if Woodman was called by the defendant his cross-examination would show that the instrument in question was fraudulently obtained; and it is not uncharitable to suggest that the apprehension of this led to the ingenious and prolonged efforts which were made to establish the execution of the instrument without the aid of his testimony. They failed, however. He was sworn, and stated that he saw Chaffee execute the agreement. Thereupon the plaintiff's Counsel was proceeding in the usual manner to cross-examine the witness, when Mr. O'Connor asked the object of such examination, and what was expected to be proven thereby; whereupon I, as Counsel for Mr. Day, stated in substance that we intended to prove by that and other evidence that the agreement of the 5th of September was procured from Chaffee by Judson through fraudulent representations and practices, some of which were then stated by me, but which need not be here repeated; and that it was so obtained while Judson stood in the relation to Chaffee of his attorney and legal adviser. After I had made this statement Mr. O'Connor objected to the cross-examination, and insisted that the proposed evidence was inadmissible at law to impeach the validity or destroy the effect of the agreement, and he thereupon declared to the Court that he was prepared to maintain this proposition by argument, and by the most conclusive legal authorities.

"This was the question presented; these the circumstances under which it arose. I then entertained no doubt of the plaintiff's right to introduce the proposed testimony, and that opinion was confirmed by the argument which followed and by the authorities which were referred to. I have before me what I believe to be a correct report of the decision

of Judge Betts upon the point. In that he says: 'I wish to make the decision explicit, so as to afford the parties every benefit of exception, and therefore state that in my opinion a party whose interest may be affected by a paper, under seal or not, which is offered in evidence against him in the trial of a cause at law, may give parol evidence to satisfy the jury that the paper originated in fraud, that it was procured by fraud, or that it was set up fraudulently to answer purposes it was not created for.'

"This appears to me to be a sound and quite irreproachable doctrine, and I think it had become inseparably interwoven as a part of the fabric of the common law many generations before the first volume of Johnson's Reports (mentioned by Mr. O'Connor) was published. I trust it will be many generations before it is abandoned or violated by any Court, either of law or equity. I should have great confidence that all of the learned Judges to whom Mr. O'Connor refers in his letter would follow the ruling of his Honor Judge Betts in any case where the same point should judicially arise before them.

"Very truly yours,

"E. W. STOUGHTON."

To the letter of Mr. Betts, Mr. O'Connor responded as follows:

"NEW YORK, August 7, 1854.

"*To the Editor of the Herald:*

"I was not surprised at the irritation of Mr. George F. Betts as exhibited in his note to you dated the 4th inst. A public attack upon me by the father was rightly enough followed up by the son. He has, however, travelled too far out of the record to admit of my following him. His allusion to my very great misfortune in not having children before I was married might appear more advantageously in some other place than in an attempted vindication of his father's judgment. Still, as his good taste has brought that unhappy circumstance before the public, I must ask a reasonable suspense of opinion as to any unfavorable inference Mr. Betts

may have intended to draw from it. If the legal question which I have presented is to be further pursued, I respectfully submit to Mr. George F. Betts the expediency of omitting any further reference to pedigree, family pretences, or that other subject to which, with equal pertinency to the point in hand, delicacy of taste, and purity of language, he has so felicitously alluded. Of the propriety of following this suggestion he will judge; suffice it to say, that no fear of comparisons has dictated it. Far from imagining the sinful design imputed to me, my sense of right approved, and still approves, as most appropriate, the call upon Mr. Betts to vindicate at once the accuracy of his father's judgment and in some degree the rectitude of his client's cause. So far from offering to lay a wager, which would have been unlawful, I offered a liberal reward for the discovery of a valuable truth. So far from wishing to give just cause of offence, my language was courteous to all concerned. I imputed no 'fault' to Judge Betts, but only by inference from my own opinion suggested error. With this all our Judges are constantly charged in the Courts of review.

"But to the point in hand. Mr. Betts does not meet the question at all. He appends a note from Mr. Stoughton. To that gentleman's statement on any subject I would pay the greatest respect. I am sure he is, and I hope I am, incapable of a wilful misrepresentation. I deny no matter of fact contained in his letter. He neither denies nor varies any matter of fact contained in mine. Any lawyer reading both letters will perceive this, though it may not be obvious to gentlemen who are not experts in questions of mere technical practice.

"There is not, and never can be, any dispute about facts in this case. The question distinctly arose precisely as I have stated it. It was by the learned Judge distinctly, directly, and without any equivocation met and decided. I need not repeat my invitation for proof of the correctness of his judgment, nor restate my reasons for seeking and offering to pay for the proof. They are plainly before the public in my letter to Mr. Gerard.

"Your obedient servant, CH. O'CONOR."

Afterwards Judge Betts prepared and filed an elaborate and very able opinion, citing numerous authorities, and among them several from Johnson's Reports sustaining the doctrine of the decision given by him on the trial.

Mr. Clinton well remembers another occasion on which Mr. O'Connor assailed, with vehemence and acrimony, a Judge who, on the trial of an important case, gave a decision against him. A prominent and esteemed citizen of an interior county in the State of New York, after the death of his father-in-law, presented a claim against his estate for thirty thousand dollars, the amount of a draft in his favor purporting to have been executed by the decedent in his lifetime. The claim was rejected on the ground that the signature was a forgery. The party brought a suit against the executors to recover the amount in dispute. The defence of forgery was interposed. He succeeded upon the trial and obtained a judgment for the amount claimed. Afterwards he was indicted in the City of New York for forging the draft on which he had obtained judgment in his favor. The trial came on in the Court of Oyer and Terminer for the City and County of New York about fifty years ago, Judge Edmonds presiding. John McKeon, District Attorney, and Mr. O'Connor conducted the prosecution. Joshua A. Spencer, of Utica, David Graham and Ambrose L. Jordan, of New York City, conducted the defence. At the close of the evidence Counsel for the defendant made a motion to the Court to direct the jury to acquit on the ground of an entire failure of proof to make out even a *prima facie* case of forgery. Mr. O'Connor opposed the motion in an argument of great length. Judge Edmonds, after hearing both sides fully, held that there was no evidence of forgery, and he therefore directed the jury to render a verdict of acquittal. After the decision was rendered, Mr. O'Connor arose and

made a long, bitter, and fierce argument against the correctness and propriety of the decision. He cited case after case of judicial tyranny and oppression. The tone of his argument was extraordinary, and it was still more extraordinary that Judge Edmonds should, after he had rendered his decision, hear an argument, and especially *such* an argument. But it was even more extraordinary that, after listening for hours to Mr. O'Connor, Judge Edmonds should recall his decision and permit Counsel on both sides to address the jury. After Counsel for the defence had closed, Mr. O'Connor addressed the jury for ten or eleven hours. Judge Edmonds delivered a strong charge to the jury in favor of acquittal. He made no effort to conceal his opinion of the merits of the case, although in form he left it to the jury to decide. The result of the timidity and vacillation of Judge Edmonds was that four of the jurors were for conviction. This was not strange after they had witnessed the extraordinary scene of Judge Edmonds withdrawing his decision directing the jury to acquit. When they saw the Judge and the lawyer change places, O'Connor overruling the Judge and the latter yielding a submissive obedience to the former, it was but natural that some of the jurors should become confused as to which *de facto* was the Judge and which was the lawyer. This, however, was the end of the prosecution, as the case was never again tried.

Should Charles O'Connor be held up as a model for young and rising lawyers to pattern after, it should be remembered that he had his limitations. Too much cannot be said in condemnation of the trait above referred to. To treat with proper respect every Court and every Judge before whom a lawyer practises is the first lesson he should learn. No lawyer, under any circumstances, should ever depart from this rule, unless he is sure that the Court or Judge is corrupt. Above

all things, a lawyer should entertain kindly charity towards his opponents and Judges who differ with him. When we take into consideration the different standpoints from which lawyers and Judges view facts and the law applicable to them, it is not strange that differences of opinion are so great. Lawyers, despite their utmost endeavors to embrace within their intellectual vision both sides of a case, are very apt to see but one side; and that is the side on which they are retained. Young lawyers should understand at the outset that a lawyer's practice, if he be of any importance at the Bar, is an alternation of successes and defeats. At times it will seem as though defeat followed swift on the heels of victory, and *vice versa*. Successes will not continue so long and with such uniformity as to become monotonous. Lawyers should not forget that if in their cases sometimes success should run on continuously, with scarcely a break for a considerable period, suddenly their "luck" will change, and for a still longer period they will be beaten in most of their trials and arguments. Of one thing any lawyer may rest assured—that too often, when in his own mind he is positive, absolutely certain, of success, he will be defeated; and in not a few instances, when, had he himself officiated as Judge or jury, his decision would be adverse, he will be successful. But come what may, success or defeat, there can be but little excuse for a lawyer, young or old, who, under any circumstances, be the provocation ever so great, fails to maintain his self-possession, or to observe the proprieties of professional life.

Notwithstanding Tweed's sins of omission and commission, the termination of his career was a sad one. His success in the *habeas corpus* case, which by the decision of the Court of Appeals released him from further confinement in the penitentiary, did not restore him to liberty. He merely exchanged the penitentiary for

the county jail. In April, 1875, while he was a prisoner on Blackwell's Island, a suit was commenced against him in the Supreme Court in the name of the people of the State of New York to recover about six millions of dollars, on the ground that as a member of the Board of Audit for auditing claims against the county of New York he had caused fraudulent claims to be paid by the county. When discharged from Blackwell's Island he was arrested under an order made in that suit and confined in Ludlow Street Jail, the amount of the bail called for by the order being three millions of dollars.

On the 4th of December, 1875, David Dudley Field and William Edelsten, Counsel for Tweed, had an interview with him at Ludlow Street Jail in regard to important legal matters. They left him about half-past twelve o'clock. About three o'clock in the afternoon of the same day Tweed left the jail in company with three of the Sheriff's deputies. After driving through the Park they went to Tweed's house in Madison Avenue (on the east side, near Sixtieth Street) and dined there. After Tweed had seated them at the table he excused himself, saying that he desired to talk with his family. When the deputy sheriffs had finished eating and drinking they inquired for Tweed. He was gone. Tweed's escape caused great sensation in the city of New York and throughout the country. The search made for him was in vain. If one escapes from criminal or civil process and desires to hide, there is probably no place in the civilized world where he can be secreted with as much prospect of safety as in the City of New York. There is no doubt that Tweed remained concealed in this city for several weeks. Nor can there be much doubt that one person, if he were now living, could tell exactly where Tweed spent his time during that period. That person was his private secretary. His name was Foster Dewey.

Before Tweed was captured the suit above referred to was brought to trial. It was vigorously and very ably defended. Tweed's Counsel upon the trial were David Dudley Field, his son (Dudley Field), Robert E. Deyo, and William Edelsten. David Dudley Field was a very distinguished lawyer of world-wide renown. His address to the jury on the trial of this suit for six millions of dollars was masterly. The following extracts from his address, published in the *Albany Law Journal*, March 18, 1865, will give a faint idea of his great ability:

"From the time when this suit was brought, last spring, down to the time of trial, we heard nothing but denunciations of the defence for impeding the course of justice. There was, indeed, no real defence, it was said, and repeated so often that they who said it, at first in ignorance or bad faith, may have come at last to think they had reason to believe it. We have now reached a decisive trial of the merits, if a first trial of a cause so important can ever be thought decisive, and, after two months of hard labor, what is the result? Why, that the plaintiffs are already defeated in respect to more than two millions of their claim, a sum worth contesting for, to my thinking, and we are now coming to you, gentlemen, to decide whether the claim shall not be still further reduced or rejected altogether.

"Above all other things is justice. Success is a good thing; wealth is good also; honor is better; but justice excels them all. It is this which raises man above the brute, and brings him into communion with his Maker. To be able to stand impartial in judgment, amid circumstances which excite the passions; to maintain your equipoise, however surging the currents may be around you, is to have reached the highest elevation of the intellect and the affections. To have the power of forgetting, for the time, self, friends, interests, relationship, and to think only of doing right towards another, a stranger, an enemy perhaps, is to have that which man can share only with the angels, and with Him who is above men and angels.

"The part which you are now called to perform in an official act, designed to be an act of justice, is unhappily beset with difficulties. The just indignation of a betrayed and defrauded people, the abhorrence that every true man feels of robbery, public or private; the cry for redress, the thirst for vengeance, the suspicions which fall alike upon the innocent and the guilty, the corruption of our politics, long accumulating and more and more corrupted by the demoralizations of the war; the malversations in office, which seem to grow day by day—the stories of these wrongs repeated, exaggerated, distorted by a Press which lives upon sensation, and operating upon a people becoming every year less sedate and more impulsive, until it seems ready to fall under the reproach once cast upon an ancient race, 'Unstable as water, thou shalt not excel'—all these things have brought us into a condition as frightful as it is abnormal, which would almost justify for once the language which the greatest of English dramatists has used for other turbulent times,

" 'O judgment, thou art fled to brutish beasts,
And men have lost their reason !'

"It is easy to see what act of each of us would commend us most to the clamorers of the hour. If the learned Judge who has presided with so much dignity and patience had yesterday announced from the bench that the defence is a miserable subterfuge, unworthy of a moment's serious consideration, instead of ruling as he did, he would have been applauded this morning by half the newspapers of the city as a Daniel come to judgment; if you, gentlemen of the jury, were to render a verdict for the whole amount claimed without leaving your seats, you would be greeted with the welcome of 'good and faithful servants'; and if we, who are conducting the defence, with what fidelity you may judge, were to betray our client, and suffer judgment to pass against him, with only a seeming effort in his behalf, we should have the comfort of being informed in the same newspapers that we had half redeemed ourselves from the disgrace of defending him at all. This might happen to-day.

But how would it be ten years hence? If you should then look back to this court-room and these surroundings, read the journals which you read this morning, and those others which you have read from day to day during the trial, what would you say or think? Are you sure that you would then regard most of the comments on this trial which you now see printed and spread before your eyes each day as anything better than the babblement of idiots?

“How will it be with each of us in our judgment of ourselves? How will it be with a new question? What you do, what the Judge does, what the Counsel do, will be thought of for a long time hereafter. There are many other people than those who now surround us who will observe, criticise, and judge all our acts, without partiality and without passion.

“For myself, personally, this trust has been an occasion of great embarrassment. Severe illness in my family during the whole period has caused me anxiety by day and interrupted sleep by night, which have, in a measure, unfitted me for the discharge of my whole duty to my client. What that duty is—that is to say, what is the duty of an advocate to his client—I have had frequent occasion to explain, and every day's experience and observation have but served to confirm the convictions of my earlier life. The ignorant and the wicked always wish to take the law into their own hands. The wise and the good get the best Judges they can, procure as good laws as they are able, and leave the administration of justice to those to whom it is confided and who alone are competent to its due performance.

“In this country we, who rejoice that we are the heirs of all the ages, have, in our own conceit at least, built on broader foundations than our fathers, and with stronger walls, the defences of human rights, and among them all there is not one of greater significance than this, that no man shall be deprived of life, liberty, or property without due process of law. The people of our State have placed it in their State Constitution, and since the late troublous times the people of the whole country have placed it in the Constitution of the nation. There it stands, and will ever

stand, so long as either the nation or the State remains. *Manet, et manebit.* How idle, then, it is to talk of excluding any person whomsoever from defence or opportunity of defence to any charge whatever! In conformity to this fundamental law, a summons is served upon every defendant to answer a written complaint. It is his right to answer. How can he exercise that right without the aid of Counsel? Therefore he, whoever he may be, who denies the right and duty of Counsel to defend any man, seeking his aid as in defence, denies the right of the man to defend himself, and whoever in this country denies the right of any man to defend himself must be accounted as either a knave or a fool.

"I am quite indifferent to the reproaches that out-of-doors have been cast upon me for my defence in this case. When, however, the reproaches come into this court-room, and are made as if they could affect you, I feel bound, for that reason alone, to take notice of them, so far, and so far only, as to say that I despise them. I prefer the judgment of my brethren of the Bar. If the Press were unanimous, which it is not, nor anything like it, the Bar is stronger than the Press. It does not make so much noise, but its influence, though silent, is irresistible. Mr. Willis invented the convenient phrase of the 'upper ten thousand.' Using it here, not in relation to general society, but to the society of lawyers, I venture to say that the opinion of the upper ten thousand of American lawyers will sooner or later become the opinion of the American people. I am well aware that, in this State at least, some traces of the irritation may yet remain which a lifetime of warfare against legal abuses has engendered. By many of my elder brethren I am regarded as one who has overthrown their idols and brought their false systems into derision. I do not complain. I have had my reward. The Reformed American System of Procedure, as it is called by one of the best legal writers of our time, opposed and derided as it was at first, has made its triumphant march around the world, and is already written in the laws of half the English-speaking

people, and will yet be written in the laws of them all. Even now while I yet speak they are writing it in the law of Australasia. But whether any trace of the irritation which this has occasioned is remaining or not, I am ready to leave my defence of this case to the vindication of my brethren throughout the country, confident that they will say I am maintaining, as I have ever maintained through a long life, the dignity, honor, and independence of my profession, my order—the order of advocates, to which I am proud to belong—and in that way, for they are inseparable, the rights of all the people.”

Mr. Field here discussed the political aspects of the case, and declared that the prosecution was not in good faith.

“I have dwelt thus long upon this topic because I think it gives the key to this prosecution. My deliberate conviction, after the most careful attention—and I hope I do no injustice to the motives of any—my deliberate conviction is, I say, that this action has not been brought in good faith for the purpose of obtaining what is justly due from the defendant to the County of New York, but that its purpose is personal and political advantage to those who have control of the proceedings.

“Having laid before you these general observations, preliminary to the main inquiry, I pass to a consideration of the precise issues which the case presents for decision, and of the evidence upon which the decision is to be made.”

After considering the evidence and its applicability to the various items claimed in the plaintiffs' account, Mr. Field concluded as follows:

“Such are the considerations, gentlemen, which I have ventured to offer for your attention when you deliberate upon your verdict, and I end, as I began, by appealing not only to your intelligence, but to your love of justice. I appeal to that regard for fair-play which every American is

taught from his childhood, to that sentiment of honor which disdains the use of a State prosecution for personal or political ends, and to that hatred of oppression which strives ever to defeat it, even though clothed in the forms of law."

The trial of the suit against Tweed to recover six millions of dollars commenced before Judge Westbrook February 7, 1876, and was concluded on the 8th of March, 1876. It resulted in a verdict for plaintiff for:

Principal.....	\$4,719,940.35
Interest to March 1, 1876.....	<u>1,817,177.03</u>
	\$6,537,117.38

On April 6, 1876, judgment was entered for the amount of the verdict as above and the following additional sums:

Interest on the verdict to April 6, 1876.....	\$36,862.08
Allowances.....	60,000.00.
And costs.....	<u>1,672.73</u>
Making a grand total of.....	\$6,635,652.19

An appeal from the judgment was taken to the General Term of the Supreme Court, First District, held by Judges Davis, Daniels, and Brady. On January 26, 1877, the judgment against Tweed was affirmed.

Tweed, after his escape from jail, having spent several weeks in or near New York City, thought it more prudent and far safer to leave for foreign parts. He left for Cuba. It cannot be stated with certainty in what vessel he sailed, although an intelligent guess on that subject could be made. He arrived in Cuba the latter part of June, 1876. It was in vain he sought peace and quiet. Notwithstanding his disguise, his identity was discovered, and he was set upon by a blackmailer, who, after accosting him and calling him by name, coolly in-

formed him that it was worth one hundred thousand dollars to conceal his (Tweed's) identity. Tweed took in the situation at once, and informed this individual that he had not that amount of money handy, but in the course of a short time he thought he could get it. In the latter part of July, and before the time arrived for the payment of this sum of money, Tweed sailed in the bark *Carmen* for Spain. He believed that this individual, embittered by the loss of the one hundred thousand dollars, learned of his departure and informed some of the United States Government officials. At that time our Government had no treaty with Spain in relation to the extradition of criminals; besides, Tweed, at the time of his escape, was not held in custody on criminal process. He was merely held to bail in a civil suit. When we have treaties with other Governments for the extradition of criminals, no provision is ever made for the extradition of persons who escape when confined upon civil process. The United States Government has nothing whatever to do with such cases. Tweed had good reason to believe that he would be entirely safe in Spain. The United States Government, however, arranged with the Spanish Government to arrest Tweed on his arrival in Spain and surrender him. The New York *Sun* gave the following account of Tweed's capture:

"MADRID, *September 9* [1876].

"It was found in July last that Tweed was in Santiago de Cuba, having passed there from Havana. General Jovellar was applied to by the American Consul to have Tweed secured and sent to the United States. Jovellar was willing, even in the absence of an extradition treaty, to oblige the American Government in return for their courtesy in the Arguelles case some years ago.

"Tweed, however, was apprised in Santiago of his impending danger, and sailed for Vigo, Spain, on July 27, on board the sailing-vessel *Carmen*. Mr. Cushing thereupon

informed the Spanish Government of the fact, and found them willing to arrest Tweed and return him to Cuba or deliver him up to the American Consul. Every precaution was taken by the Spanish Government to secure Tweed's arrest in any port in Spain or on any coast line by which he might arrive. Severe orders were given to the local authorities, especially those of Vigo and the Galician coast.

"On September 6th, after a long passage of forty-one days, the *Carmen* hove in sight off Vigo, and was immediately boarded by the Governor of Pontevedra. The Governor at once recognized Tweed from photographs which he had had in his possession for some time previous to the arrival of the fugitive. Tweed was entered on the ship's papers under the name of Secor, and was accompanied by a man giving his name as William Hunt, who is said to be his nephew. Both were immediately secured and thrown into the calabozo, under a strong guard, but were subsequently transferred by order to a fortress in Vigo under the command of the Captain-General."

The man William Hunt, referred to in this article, was not a relative of Tweed. He was a travelling companion whom Tweed had engaged in Florida. He did not know who Tweed was. After their arrival in Spain no communication was had between him and Tweed. Tweed was kept in solitary confinement in the Vigo fortress for several weeks. He was allowed to see no one. One of his sons who went from London to Vigo to see him was not permitted to have an interview with him. Tweed, while so confined, lived on prison fare, which was very poor. He saw no one except his keepers, and with them he could not converse, as he did not understand Spanish. Fortunately he had some yellow paper, which he cut into small pieces, of which he made dominos and played with them. He said that but for this occupation he thought he would have gone crazy.

On the 27th of September, Tweed having been sur-

rendered to the United States Government, the United States frigate *Franklin*, with him on board, left for New York. Tweed, in speaking of his departure from Spain, said he was never happier in his whole life than when he was put on board the *Franklin*. It seemed to him, after his experience of the horrors of solitary confinement in a Spanish prison, that he was in paradise. He was treated well during the voyage to New York. Upon his arrival here, on the 23d of November, 1876, he was conveyed immediately to Ludlow Street Jail. His baggage was seized and taken to Washington. Among his effects were found the domino scraps of paper. The Attorney-General thought they were very important cipher despatches, by means of which Tweed carried on political intrigues with his confederates, so that his schemes, whatever they were, might be executed.

When Tweed's troubles began, in 1871, a large number of the most eminent lawyers in New York City accepted retainers from him. In the way of lawyers' fees he poured out his money like water. According to written memoranda in his handwriting, between the 20th of September, 1871, and the 10th of July, 1872, he paid out in lawyers' fees upwards of eighty thousand dollars. This was only a commencement. The amounts paid by him for legal services up to the time of his trial and conviction must have been stupendous. Upon his return to jail, instead of being enormously wealthy, possessing millions upon millions, as he did in 1871, he was practically poor. He was not only bankrupt, but there were judgments against him, obtained by reason of his official misconduct, amounting to about twenty millions of dollars. Upon his return to Ludlow Street Jail he could only afford to employ one lawyer. He retained the late John D. Townsend, upon the agreement that he should act for him professionally in all his legal difficulties for the sum of ten thousand dollars, irrespective

of the amount of legal work to be done and the time which it might occupy. Tweed found it not an easy matter to raise a part of this sum and give Mr. Townsend security for the balance. Mr. Townsend discharged his professional duties faithfully, but Tweed remained in jail until the 12th day of April, 1878, when he died.

CHAPTER XXXI

SUIT OF JOHN KELLY AGAINST WILLIAM F. HAVEMEYER AND NELSON J. WATERBURY

An Action for Libel brought in 1874.—Kelly Seeks to have Governor Dix Remove Mayor Havemeyer for Violation of Official Duty.—The Mayor Publishes a Letter Charging Kelly with Official Misconduct when Sheriff of the City and County of New York.—Kelly Sues the Mayor and Nelson J. Waterbury for Libel.—Motion in Special Term of Supreme Court to Strike out Portions of Mayor Havemeyer's Answer.—Sudden Death of the Mayor during the Argument of his Counsel on the Motion.—Remarkable Specimen of Obituary Eloquence by his Senior Counsel, John K. Porter, on a Motion to Adjourn in Token of Respect to the Memory of the Mayor.—Reply of Mr. Clinton, Counsel for Kelly.—Decision of the Motion.

THE following are extracts from the New York *Daily Times* of July 9, 1874:

"MAYOR HAVEMEYER—THE DEMAND FOR HIS REMOVAL

"The announcement of the resignation of Police Commissioners Gardner and Charlick was received with the utmost surprise yesterday by all classes of citizens, and at first many refused to credit the report. The appointment of Mr. Mat-sell to fill one of the vacancies met with very general disapprobation. The selection of Mr. Voorhis, however, was commented upon favorably.

* * * * *

"By special appointment, the delegations from the various political organizations of this city that seek the impeachment of Mayor Havemeyer and urge his removal by the State Executive met Governor Dix yesterday morning

at his country residence on Long Island, a few miles from the Westhampton depot. The delegations consisted of John Kelly, in the interest of Tammany Hall, accompanied by his Counsel, Messrs. Wingate and Campbell ; Mr. Henry L. Clinton, representing Mr. Watrous and several members of the Committee of Seventy ; and Mr. Joseph C. Jackson, in behalf of the Council of Political Reform. The proceedings comprised petitions presented by Messrs. Clinton and Wingate demanding the removal of the Mayor on the ground of a violation of his oath of office in not investigating, as required, charges preferred against Commissioners Gardner and Charlick, of the Police Board, and reappointing them to office in the face of a conviction which rendered them, as alleged, ineligible.

* * * * *

“The proceedings before Governor Dix yesterday were commenced by an address by Mr. Henry L. Clinton. He said :

“‘We come on a very painful and sad duty. We are here to prefer charges against William F. Havemeyer, Mayor of the City of New York, a gentleman who, during a long life, has enjoyed the confidence and respect of the community. The duty we have to perform is the more painful because during the great reform movement which struck from power a cabal the most infamous perhaps of modern times he was among the foremost in it, and the friends of reform looked to him with the greatest confidence, and relied upon him to guide them through the reform movement. We deem it an imperative duty, under the circumstances, to prefer charges against him as we would against any one occupying his position whose record had been less pure than we believed his to have been. He has committed an act which, we think, calls for the immediate interference of your Excellency. The charges which I prefer on behalf of Mr. Watrous, formerly a member of the Committee of Seventy, and several very prominent citizens are brief, and I will read them.

[Mr. Clinton here read the text of his formal petition, which is as follows :

“To his Excellency JOHN A. DIX, Governor of the State of New York :

“The undersigned respectfully represent to your Excellency :

“First. That William F. Havemeyer is now, and has been since the first day of January, 1872, Mayor of the City of New York.

“Secondly. That in the month of May, 1874, Oliver Charlick and Hugh Gardner, who were then, and, until their trial and conviction, as hereinafter stated, in the Court of Oyer and Terminer of the County of New York, continued to be, Police Commissioners of the City of New York, were indicted by the Grand Jury of the County of New York ; a copy of the indictment is hereto annexed, marked ‘A,’ and forms part of this petition.

“Thirdly. That on the twenty-fourth day of June, 1874, the said Charlick and Gardner respectively pleaded not guilty to said indictment in the said Court of Oyer and Terminer of the County of New York. On the twenty-fourth and twenty-fifth days of June, 1874, they were tried on said indictment before said Court, and a jury duly impanelled. On the twenty-fifth day of June, 1874, the jury rendered a verdict of guilty against the said Charlick and Gardner.

“Fourthly. On the twenty-sixth day of June, 1874, the said Court pronounced judgment on such conviction, and sentenced said Charlick and Gardner to pay a fine each of \$250.

“Fifthly. On the thirtieth day of June, 1874, John Sparks, clerk of the said Court of Oyer and Terminer, sent to your Excellency a certified copy of said proceedings in said Court of Oyer and Terminer and the notice of the conviction and the cause thereof.

“Sixthly. On the first day of July, 1874, your Excellency (having that day received the said certified copy of the pro-

ceedings and notice hereinbefore referred to) sent to the said William F. Havemeyer, Mayor of the City of New York, a notice of which a copy is hereto annexed, marked 'B,' and forms a part of this petition, which notice was duly received by him.

"Seventhly. After the said William F. Havemeyer, Mayor of the City of New York, received said notice so sent to him by your Excellency, the duty devolved upon him to appoint two suitable and fit persons (other than the said Charlick and Gardner) Police Commissioners for the City of New York, by reason of the vacancies which had occurred as stated in the said notice of your Excellency.

"Eighthly. After he had received the said notice, so sent him by your Excellency, and on the second day of July, 1874, he, the said William F. Havemeyer, Mayor of the City of New York, in gross and outrageous violation of his duty as such Mayor, and in defiance of law and public decency, appointed the said Charlick and Gardner respectively as Police Commissioners of the City of New York, appointing the said Charlick to the vacancy created by the conviction of said Gardner in the said Court of Oyer and Terminer, as hereinbefore stated, and appointing the said Gardner to the vacancy created by the conviction of the said Charlick in said Court as hereinbefore stated. The said William F. Havemeyer, Mayor of the City of New York, thereupon on the second day of July, gave the said Charlick and Gardner respectively certificates of appointment as Police Commissioners of the City of New York, copies of which said certificates are hereto annexed, marked respectively 'C' and 'D,' and form a part of this petition.

"For the official misconduct of said William F. Havemeyer, hereinbefore set forth, your petitioners pray that your Excellency will remove him from the office of Mayor of the City of New York.

"Dated, NEW YORK, *July*, 1874."]

"Resuming, Mr. Clinton said:

"A precisely similar petition is signed by John P.

Crosby, Joseph C. Jackson, William Pritchard, C. A. Hand, Benjamin B. Sherman, William C. Barrett, and A. A. Redfield. These are the signatures of prominent gentlemen of the Committee of Seventy, of both political parties, and on their behalf I present this petition. I will merely state to your Excellency that it is of the highest importance, in our judgment, that immediate action be taken upon this matter. I need not remind your Excellency that the Police Board is, perhaps, the most important department of our City Government; and at this season of the year it is of the highest importance that it should be properly constituted. It is hardly worth while to speak of the evil example set by such a violation of law, and, as we consider it, of public decency. As a lawyer, I have examined the matter, and have no doubt whatever that, under the provisions of the charter, Messrs. Charlick and Gardner were ineligible for appointment. The charter provides that the heads of the departments who are convicted of any wilful violation of its provisions or of any wilful evasion of them, are forever disqualified from holding any office under the City Government. These parties were convicted of a violation of their duties in respect to the removal of an inspector of election without giving him the notice required by law. These provisions of law, as I view them, are substantially part of the charter. In one section it is provided that the Police Commissioners should perform the duties required of them by the election law; and then, in order to make the matter more certain, in a supplemental act, passed the same session, a distinct provision was made, in so many words, that they should perform all these duties. As a lawyer, I consider, to all intents and purposes, that it is precisely the same as though that law had been incorporated in the charter. The duties which the Police Commissioners are required by law to perform are imposed upon them in the charter. But apart from the legal question, about which I suppose you will consult with the Attorney-General or your legal adviser, a more unfit or unseemly spectacle could not be presented than the appointment of two men to that position

who had been convicted of an offence which, as your Excellency stated in your notice to the Mayor, "involved a violation of their official oaths." In my judgment, if there were no other provision of the statute than that of the Revised Statutes, as it is stated in the notice of your Excellency, providing that these offices should be vacant where the incumbents were convicted of the commission of an offence which involved a violation of their oath of office, they would be disqualified; and if the appointing power should restore them to the offices, that appointing power would exercise a veto upon the acts of the Legislature. The laws are construed for the purpose of carrying them into effect according to their fair meaning. Any construction which would permit the appointing power immediately to restore to office the party who had been ousted would nullify the law itself. In this instance it is true that each was appointed to the vacancy created by the other. It is a simple evasion, and that does not alter the case in my judgment. This petition contains only facts which are true and which cannot be disputed. The documents are proof of the facts, and copies of them are annexed to the petition. I therefore trust that, owing to the great importance of the matter, it will receive very early attention at the hands of your Excellency. I will now give way to other gentlemen who will present charges embracing a wider scope.'

"At this point of Mr. Clinton's address a telegram was received from Mr. Wickham, stating that Commissioners Gardner and Charlick had resigned. The Governor incredulously gave utterance to the following expression: 'Matsell! Good gracious!' and appeared perfectly bewildered. The others present were equally surprised. They expected that something else was on the *tapis*, and their feeling on the subject was given utterance to in the following observation of Mr. Clinton:

"'The resignation of these men, Messrs. Charlick and Gardner, in my opinion, does not relieve the Mayor in the slightest degree, and as his act is such as, in our judgment, calls for the interposition of your Excellency, I am free to say on

behalf of those whom I represent, and who I have no doubt will indorse my action, that the resignation of these men should not make any difference in the action which your Excellency may take.'”

Mr. George W. Wingate addressed the Governor in support of charges against the Mayor contained in the petition signed by John Kelly, Oswald Ottendorfer, and William H. Wickham. Mr. Joseph C. Jackson followed on behalf of the Council of Political Reform.

“Governor Dix, in reply, said: ‘I will take the papers and act upon them at once and without unnecessary delay. I have only looked at the laws bearing on the matter cursorily, but I will give them a thorough examination, and you may rely upon prompt action on my part.’

“The formal interview then terminated.

“On the termination of the interview Governor Dix went shooting, and he was subsequently discovered by the entire delegation and the members of the Press in the act of bringing down a snipe. From what can be gathered from the observations let fall during the interview and subsequent announcements made to our reporters by the delegations, Governor Dix is extremely desirous of maintaining a strict reticence on the subject until he determines finally what action he will pursue.

* * * * *

“He was highly pleased with the assurance made him by Mr. Jackson that in the present proceeding, as far as he was concerned, there was no political *animus*, and, in reply, he asserted that, as far as the Executive was concerned, no consideration would be entertained except such as the dignity of his position would justify. Mr. Jackson said that the statement was unnecessary, and the country had confidence in his integrity and worth. Continuing the conversation, *the Governor said that there would be no question regarding the petition of Mr. Clinton, as the proof accompanied it*

and was apparent, but he could not act upon it without examining the charges contained in Mr. Wingate's petition in the light of the law. Mr. Wingate's petition is extremely voluminous, and will occupy some time in its consideration, but with the view of facilitating its perusal and assisting him in the study of the legal points involved, the Governor said he at once telegraphed for his secretary, Colonel De Kay, formerly Assistant United States District Attorney of this District."

On the 14th of September, 1874, Governor Dix rendered his decision. He gave an elaborate opinion, specifying his reasons. After stating his views in respect to the charges presented on behalf of John Kelly, William H. Wickham, and others, he proceeds as follows with regard to the charges presented by Mr. Clinton on behalf of those he represented :

"The other branch of the charge involves considerations of greater importance.

"Oliver Charlick and Hugh Gardner, two of the Commissioners of Police, were brought to trial on the 24th of June last on an indictment for violating the Election Law of 1872 by removing an inspector of election without the previous notice required by that act, setting forth the reasons for the removal. Of this offence they were convicted on the following day, and on the 26th they were sentenced to pay a fine of two hundred and fifty dollars each. It was my opinion, on consultation with the Attorney-General's department, that they had been convicted of a misdemeanor involving a violation of their oaths of office, and that their conviction created vacancies in their offices ; and on the first of July I addressed to the Mayor, as the proper authority for filling the vacancies, the notice required by law. It appears that on the 27th of June they had resigned, and on the 2d of July they were reappointed by the Mayor—Charlick to Gardner's vacancy and Gardner to Charlick's. In his certificates of reappointment the Mayor does not state in what

manner the vacancies were created—whether by conviction or by resignation—but declares that he has ‘been officially satisfied that a legal vacancy for a legal cause is now legally existing.’

“At the time of their reappointment both of these Commissioners were under three other indictments, found against them on the 30th of May for violations of the Election Law and set down for trial in October next.

“As his justification for making these appointments, the Mayor relies upon the opinion of George P. Andrews, who styles himself ‘Assistant Counsel to the Corporation,’ and whose conclusions, on a review of the laws which he considers applicable to the case, may be briefly stated as follows :

“That if the Commissioners had not resigned, it would have been necessary for the Mayor, on receiving notice from the Governor that the vacancies had been caused by the conviction, ‘to consider whether the offence of which they were convicted involved a violation of their oaths of office, and thereby caused vacancies, which would be [his] your duty to fill’; and that their resignations relieved him from the necessity of considering this question at all.

“Secondly. That if the conviction of the Commissioners did cause vacancies in their respective offices, this was the only effect thereby produced ; and

“Thirdly. That there was no provision of law which ‘rendered Mr. Gardner and Mr. Charlick ineligible to appointment to the offices of Police Commissioners,’ and that the Mayor had in his discretion ‘the power and lawful right to make such reappointment.’

“Mr. Andrews, as a subordinate in the office of the Counsel to the Corporation, appointed by his principal, was not acting under the responsibility of an officer elected by the suffrages of the people ; and it would be natural to suppose that the Mayor, in a conflict of opinion with the Chief Magistrate of the State in regard to the cause of the vacancies, would, in the absence of the chief of the law department of the city, have consulted with the experienced District Attorney, or some of the eminent Judges in the First

Judicial District. Such a course would have at least indicated a decent respect for the Executive of the State, whose action was ignored by the Mayor on the opinion of a subordinate in a department of the City Government, who was not even the chief of a bureau, and who has no official status recognized by law, but was merely sustained and authorized by the Counsel of the Corporation to perform his duties in his absence. It is not contended that the opinion of the Governor is final in such a case, and that it may not be judicially reviewed; but it might very properly have created a pause in the action of the Mayor, and a resort to the highest sources of authority for an adverse judgment. Such an act would have been of far more value than all the professions of respect with which his answer abounds. But the opinion of the Executive was not deemed worthy of being considered for a single day. It must have been received on the morning of the 2d of July, and the reappointments were made before night. Of the eighty pages of the Mayor's answer, fifteen are devoted to an argument in support of the positions taken by Mr. Andrews. The degree of credit to which these positions are entitled will appear by comparison with the annexed opinion of the Attorney-General of the State, which was asked for by me on the day after I heard of the reappointment of Messrs. Charlick and Gardner. This opinion maintains two propositions directly in conflict with those of Mr. Andrews and the Mayor, viz.:

"First. That the conviction of the Commissioners was for a misdemeanor involving a violation of their oaths of office; and,

"Secondly. That they were not re-eligible to the offices to which they were reappointed.

"This opinion renders it needless to enter into any examination of the Mayor's arguments, which are not less infelicitous than the illustrations by which he seeks to palliate the failure of the Police Commissioners to give to an inspector of election the notice of removal required by law. He cited as an analogous case the nomination of Mr. A. T. Stewart by President Grant, at the commencement of his ad-

ministration, to the office of Secretary of the Treasury in violation of Section 8 of an act of Congress of the 2d of September, 1789, entitled 'An Act to Establish the Treasury Department,' providing that no person appointed to any office instituted under it should be directly or indirectly interested in carrying on the business of trade or commerce, etc. It is difficult to find two cases more unlike. The mistake of the President was made under an act of Congress which was more than eighty years old, which had fallen into oblivion, and which was fairly overlooked by the Senate. The omission of the Commissioners was under an act of the Legislature passed the previous year—an act of general notoriety, applicable to the constantly occurring transactions, framed to put an end to scandalous frauds, and prescribing strict rules of conduct for all officers having any agency in conducting elections. The violated rule was one of the most vital of the safeguards against the very abuses which the act was intended to prevent. It was a real, and not, as has been suggested, a technical offence.

"The other illustration is even less apposite. The official order referred to was addressed to an officer of the revenue service after the War of the Rebellion had commenced by the forcible seizure of forts, arsenals, and revenue cutters—a war undertaken and prosecuted without the customary formality of a declaration. It was intended to prevent the capture of a national vessel by armed insurgents, and, as a naked mandate, apart from the injunction to uphold the emblem of the national authority, it would have been held in any Court, civil or military, to be justifiable on every principle of law.

"If it be conceded that the Mayor, in reappointing the convicted Commissioners, acted under a misdirection, and with a sincere belief that he had the requisite authority, it is still to be considered whether their reappointment, as an administrative act, was not obnoxious to other objections as grave as those which arise under the legal aspects of the case.

“The power of appointment is one of the most important and delicate trusts that can be confided to an executive magistrate. Offices are public property ; they should be filled with a single regard to the interest of the people; and this object can only be secured by intrusting them to those who are best qualified to perform the duties incident to them, and whose unimpeachable integrity commands the confidence of the community. It is a gross abuse of executive power to dispose of them for the mere purpose of rewarding partisan services, irrespective of superior qualifications, or of gratifying and providing for personal friends. There is little doubt that the errors of the Mayor in this case are to be attributed to a disregard of these fundamental distinctions. At the commencement of his administration he nominated as one of the Police Commissioners a personal friend and an associate of long standing, whom he has persistently sustained against all the demonstrations of the public dissatisfaction, and at last in defiance of an adverse judicial decision. In regard to his reappointment and that of his associate Commissioner, the Mayor’s answer contains the remarkable admission that he intended by a renewed expression of his confidence to do ‘something to save these men from that appearance of disgrace which they might otherwise wear in the eyes of the unreflecting crowd, when they had done nothing to merit it.’

“In other words, it is an admission that he used the power of appointment, intrusted to him for the proper administration of the public affairs, for the purpose of shielding the convicted Commissioners from the influence of the verdict of a jury of their countrymen and the sentence of the Court. It is the more extraordinary as there are three indictments pending against them, and soon to be tried; and it may be not unreasonably charged that the Mayor’s indorsement of the integrity and the ‘unsurpassed energy and capacity’ of one of the Commissioners may have been designed to forestall the judicial action which the Grand Jury, after full consideration, deemed proper in the case.

“A more ungenerous response to the confidence of the

Legislature in conferring on him, at its last session, the sole power of appointment cannot well be conceived. It was intrusted to him because the Board of Aldermen had failed to confirm the nomination by him of two citizens of the most respectable character to the office of Police Commissioner. While the question of conferring this authority on him was pending, he protested in a written communication against it. And it is one of those examples of eccentricity with which he has more than once surprised his fellow-citizens, that, after protesting against the possession of a power, he should have proceeded when it was conferred upon him to exercise it in such a manner as to make all who were instrumental in confiding it to him regret that his protest had been unheeded.

“His anxiety to sustain his ancient associate has manifestly led him into devices utterly repugnant to his characteristic candor and directness of purpose. If he had been thoroughly convinced of the re-eligibility of the convicted Commissioners to office, he would have appointed each to his own vacancy. In appointing one to the vacancy created by the other, in each case he alleges ‘that this was not done to evade any law, but with a view to prevent the making of any question as to the legality of the appointments.’ If there is any appreciable difference in the two branches of this proposition, it is believed that there will be found an insurmountable difficulty in logically defining it. It cannot be doubted that there was in regard to the reappointment of the Commissioners an indirectness of action unworthy of the character of its author—by the device of procuring their resignations before the Executive could give notice that vacancies were caused by their conviction; of obtaining from a subordinate in the law department an opinion in favor of the legality of their reappointment; of assigning each to the vacancy created by the other, and of hastening the consummation of the act, after receiving the Governor’s notice, without having recourse to the best authority to assure himself that he was not acting in violation of the law. In all this, and in the reappointment of the convicted Commission-

ers while under indictment for other offences, he offered an affront to public opinion and to the moral sense of the community which resulted, as might have been expected, in compelling them to abandon the posts in which they were thus indecently reinstated.

* * * * *

“Throughout his answer the Mayor treats the charge against him as attacks by his political adversaries. The origin of accusations of this sort is of little moment. The only essential consideration is whether they are well founded. It rarely happens that a party enters upon the correction of its errors or abuses until it is put in motion by the scourges of political opponents. The same observation is true, as a general rule, of public men. In this the Mayor is obviously under a delusion. Among those who are pressing his removal most earnestly are many by whom his election was most warmly advocated, and who, until a very recent day, were the most sincere and disinterested supporters of his administration.

“It remains only to consider whether the facts disclosed are such as to justify the removal of Mayor Havemeyer from office. That the case comes within the power of removal confided to the Governor can hardly be disputed. The power is limited only by his discretion. It is not necessary, in order to warrant its exercise, that there should be any violation of law on the part of the officer against whom the charge of misconduct is brought. It would seem rather to have been designed by the Constitution for cases of abuse or malfeasance in which no law had been infringed and for which no legal redress had been provided. It is a high prerogative, to be exercised only in the interest of the public, and not to punish official misconduct. The question in what manner the removal of an officer is likely to affect the department with which he is connected or the administration over which he presides enters of necessity into the consideration of every case. In that of the District Attorney of Kings County it had been disclosed that a financial officer had appropriated to his own use a large amount of money

in violation of the law, and the removal was not only justified by the belief that the prosecuting officer had, from improper motives, failed to do his duty, but by the assurance that a successor might be appointed who could protect the city from further depredation and call the offender to account. The result proved the correctness of these conclusions. The action of the District Attorney led to the disclosure of a still larger defalcation, for which the defaulter is now under indictment.

"In this case there is no such public interest to be guarded. It is undeniable that the good name of the city has been tarnished and the dignity of the office of its chief magistrate compromised. But there is no imputation of corrupt motives to the Mayor, nor is it pretended that his removal is necessary to protect any public interest which will be imperilled by his continuance in office. In all his official action in regard to the financial concerns of the city, his course has not only been unexceptionable, but in the highest degree worthy of commendation. He has resisted all attempts to impose unjust and fraudulent claims on the public treasury; he has acted uniformly and earnestly on the side of economy, and in furtherance of the reform of those abuses under a former administration of the municipal affairs of the city the exposure of which led to his election to office. In none of these respects has he been unfaithful to his constituents; nor have his appointments, with few exceptions, been objectionable, though not always, perhaps, made with the best judgment. His errors, grave as they are, belong to the class which are left to popular reproof more properly than to Executive correction.

"This view of the subject, as it affects the interests of the city, would not be complete without considering what consequences would follow his removal from the administration of his office, in its relation to the financial arrangements about to be made for the ensuing year. The Mayor is one of the four members of the Board of Estimate and Apportionment. The apportionment of taxes for the year 1875 is to be made before the 1st of November. If he were

removed, the President of the Board of Aldermen would become acting Mayor, and his place in the Board of Apportionment would be filled by a new president, to be elected by the Board of Aldermen, thus changing the organization of the Board of Apportionment by bringing in a new member, with the further consequence of placing two individuals in high and responsible official positions, for which, however capable and meritorious they may be, they were not intended by the people ; and our experience has not been so satisfactory as to commend such substitutions to public favor. With the Mayor's known conservative views, it would be greatly to be regretted that he should be removed from his position in the Board of Apportionment at the moment when the most important measure of the year, involving the appropriation of more than thirty millions of dollars—a measure which affects more nearly the interests of the taxpayers, and indeed of all classes of citizens, than any other—is to be carefully canvassed, matured, and adopted. Under all these circumstances, and in view of the public interests at stake, I deem it proper to decline any further proceedings in the case. In a few weeks the question of the nomination, and in less than two months the question of the election, of a successor of the Mayor will be presented to the people of the city. In the decision of these questions they will either directly or indirectly pass judgment on his official acts, and to them the whole subject may be safely left, with the assurance that the verdict will be such as the occasion demands, and in consonance with an unprejudiced sense of right towards him and towards themselves.

“JOHN A. DIX.”

In consequence of the action of John Kelly in preferring charges against Mayor Havemeyer, with a view to his removal from office, he (the Mayor) and Nelson J. Waterbury, in letters and statements published in the newspapers, fiercely attacked him, and made accusations against him which were grossly libellous. He brought an action for libel against them in the Supreme

Court. On the 30th of November a motion was brought on in the Supreme Court Chambers before Judge Westbrook, to strike out certain portions of the answer of defendant Havemeyer. The following account of the proceedings appeared in the *New York World* of December 1, 1874:

“THE LIBEL SUIT ABRUPTLY ENDED.

“Almost at the moment of the Mayor's death, Judge Westbrook, in the Supreme Court Chambers, called the case of ‘John Kelly against William F. Havemeyer,’ and both sides answered that they were ready. The motion in the case had been set down for a hearing on Friday last before Judge Donohue, Mr. Waterbury making a preliminary objection that it could not properly be heard before the first Monday of December. The Court overruled the objection, but, remarking that he supposed the real objection was to the Judge, set the case down at the head of the calendar for yesterday, when, he said, another Judge would be present. Messrs. Henry L. Clinton and George W. Wingate were present on behalf of the motion and ex-Judge John K. Porter and Nelson J. Waterbury appeared in opposition. The court-room was filled with interested listeners. Mr. Wingate stated the application to be to strike out a portion of the answer of the defendant and to make another portion more specific and certain. The suit was brought against Mr. Havemeyer for certain libels alleged to be contained in a letter published by him. Mr. Wingate stated briefly the portions of the answer objected to and the reasons why they should be expunged.

“Mr. Waterbury then began to address the Court in reply, it being arranged that the argument should be closed by Mr. Clinton and ex-Judge Porter. Mr. Waterbury had spoken but a few moments when Judge Westbrook was informed by one of the officers of the Court of the rumored death of the Mayor. The Court sent an officer to verify the intelligence and called inside the bar Messrs. Clinton

and Porter. While their whispered conversation went on Officer Ricketts came in, and, affirming the news, turned aside the window-curtain and pointed to the flags over the City Hall as they were then being hoisted to half-mast.

"Mr. Clinton slowly arose in his place and said: 'The defendant in this case having within a few moments, in his office, in the discharge of his official duties, expired, that sudden and melancholy event, of course, terminates this proceeding.'

"*Judge Westbrook.* 'Yes, sir.'

"*Mr. Clinton.* 'This is not the proper time to express our commiseration and our sense of the great loss sustained. I therefore move, if the Court please, that we do now adjourn.'

"*Ex-Judge Porter.* 'The sad intelligence which has just reached us has brought to a sudden termination the proceedings in which we, as Counsel for the Mayor, were *instructed to vindicate one of his last living utterances.* [Here Counsel appeared overcome with emotion, and his voice trembled.] If we were to proceed further with it it would be in *vindication of his memory.* From the nature of the proceeding it terminates with his life.

"'It will be for your Honor to determine whether it would or would not be proper to grant the motion suggested by my learned friend. I think that he and those he represents would be ready to give their cordial testimony to the long career so honorably pursued by him in the positions in which he has been placed by the partiality of his fellow-citizens, and *that they as well as his friends will rejoice in having the opportunity to terminate this unhappy controversy over his grave.* His life has been one memorable in the history of New York, and *I would be, perhaps, wanting in candor if I were not to say that I entertain no doubt of what your Honor's decision must have been upon the present motion if decision had been called for, and must say, in justice to my client, that we had the most entire conviction that before any tribunal he would have been able to sustain the charges which he made.* I say this not in unkindness, and

not on the proofs, for the proofs remain to be taken, but because *I would be wanting in duty to him if I were not to say that he wrote what he believed to be true and was prepared, as he supposed, to prove.*

“*Mr. Clinton.* ‘In the propriety of paying a proper tribute of respect to the memory of the deceased Mayor of our city, I most cordially concur ; but I regret that my learned and distinguished friend should have permitted anything to drop from his lips in regard to the merits of the motion in this case. While we would do honor to the public acts of the Mayor of our city to the extent that he deserves to be honored, and indulge in the utmost liberality in regard to his memory, at the same time I cannot permit the declaration just fallen from my learned friend to pass without a word in reply. That my client will be vindicated beyond all peradventure I have not the slightest doubt. But as my learned friend has almost regretted the loss of the opportunity of trying the merits, I would say that the same facts will undergo judicial investigation in the suit between the same plaintiff and Mr. Waterbury ; and therefore a proper opportunity, at a future time, will be afforded a Court and jury for final adjudication. Having said this much, I can only say that the solemnity of the occasion is such as to disarm hostility in regard to this man and his associates, and we desire that his faults, whatever they may have been, may be buried in his grave. We have no wish to utter other than words of kindness and such as are suitable on so solemn and important an occasion. Whether, in paying respect to the memory of the chief magistrate of the city, in consideration of the pressure of business in this Court, it be more proper to adjourn now or at a later period of the day, is a matter, of course, with your Honor. Situated as we are, I deemed it proper to make the motion by way of suggestion.’

“*Judge Westbrook.* ‘Owing to the sad event which has just taken place, it will, of course, be unnecessary to proceed further with this motion. It must end with the life of the party against whom the action was pending, and this motion therefore stands permanently adjourned and ended. In view

of the long and distinguished career of the chief magistrate of this city, which has just ended so suddenly and unexpectedly, it is but due to him and the public that the Court should be now adjourned until to-morrow. Whatever differences of opinion there may have been as to the official acts of his life, he has certainly been connected prominently with the public affairs of this great city, and while men have differed in their judgment as to some acts of his, yet we all, I believe, concede that he was an honest man, possessing very many claims on the public confidence and respect. This tribute the Court very cheerfully pays him, not only on account of the public position he occupied, but also from having known him in the private walks of life. The Court stands adjourned until to-morrow, in token of respect to his memory.' ”

In litigation, no matter how well prepared Counsel may be, at times unexpected events occur for which there could have been no previous preparation. Fortunate is the lawyer who, when confronted with sudden and startling emergencies, does not lose his self-possession. John K. Porter, who was one of the ablest and most distinguished lawyers of the New York Bar, was extremely industrious, and noted for his thorough preparation. Upon the occasion above described he was prepared to discuss every question of law that could arise. He was ready to make a cogent, eloquent, and elaborate argument—perfect as a whole, perfect in all its parts, perfect in diction, every word aptly chosen, so that not a sentence would require alteration or revision. Prepared as he thought he was for all that could occur during the progress of the discussion, he was not prepared for the sudden death of his client. His brief contained nothing on that subject. His self-possession was gone. Although he arose for the express purpose, he forgot to second the motion to adjourn. His scant allusion to that subject almost implied that the

propriety of granting Mr. Clinton's motion was involved in grave doubt. For the moment his mind, though otherwise a *blank*, was *full* of his case, and therefore he could talk of nothing else. Could he have foreseen the solemn event, he would have been prepared with a few touching, well-rounded, and appropriate sentences, that would have done honor to any orator in the land. He had a keen sense of the importance of observing professional proprieties, and could he have been afforded but a short half-hour to think of what would be appropriate for him to say, he would as soon have cut off his right arm as to have violated, as he did, all propriety by talking wildly about the supposed merits of his case. Subsequently the same motion was brought on in the case against Mr. Waterbury, and, after full argument, Mr. Porter was beaten.

CHAPTER XXXII

CASE OF RICHARD CROKER*

Tried in the Court of Oyer and Terminer of the City and County of New York, in December, 1874, for the Alleged Murder of John McKenna, Judge George C. Barrett presiding.—Mr. Clinton's Address to the Jury.—Result of the Trial.

At the election held in the city of New York on the 3d of November, 1874, Abram S. Hewitt was the Tammany Hall Democratic candidate for Congress in the Tenth Congressional District. His opponent was James O'Brien, the anti-Tammany candidate. Early in the day

* Richard Croker was born at Roscarberry, County Cork, Ireland, on November 24, 1843. He came to the United States in 1846, with his father, Eyre Coote Croker, and settled in the Twenty-first Ward of New York City. Richard Croker attended the public schools in that ward, and afterwards entered the machine-shops of the Harlem Railroad Company. He soon gave his attention to politics, and in 1867 was elected Alderman. He was re-elected at the end of his term by an increased majority, and continued in office until 1870, when he was legislated out through the influence of Tweed, to whom he was bitterly opposed. He was appointed Marshal by Mayor William F. Havemeyer, to collect the arrears of taxes on personal property, under General Martin T. McMahon, Receiver, and in four months he collected over five hundred thousand dollars, eclipsing all previous records. He was publicly complimented by Mayor Havemeyer for his work in the Marshal's office. In 1873 he was nominated and elected a coroner of the County of New York, then a fee office, and of much more importance than at the present time. He was re-elected at the end of his term. In 1883 he became a candidate for Alderman at the request of Mayor Edson, and was elected, after a severe and hard-fought contest, in which he was bitterly opposed by the Republicans and County De-

it was evident that the friends of O'Brien were determined to resort to acts of violence in order to aid in his election. About seven o'clock in the morning the workers of O'Brien, including two of his brothers, began perpetrating a series of outrages. They commenced destroying the Tammany Hall booths for the distribution of tickets, and assaulting the men in charge of them. It was very apparent to the friends of the Tammany Hall ticket that unless these scenes of violence and outrage could be stopped, the election would result in the overwhelming defeat of Mr. Hewitt. It became the duty of Richard Croker and those under him to protect the Tammany booths and the men stationed in them. He firmly and faithfully performed his duty in this regard. While thus engaged, he and James O'Brien met. Angry words were followed by blows. While the two were clinched and engaged in personal combat—a large crowd having assembled—shots were fired, and one John McKenna, who at the time was quite a considerable distance from O'Brien and Croker, fell mortally wounded, and died soon after.

The following statement was made by Croker, according to the New York *Tribune* of November 4, 1874:

“Coroner Croker said: ‘At a quarter past seven I was at Thirty-fourth Street and Second Avenue, where I had gone

mocracy. He was appointed Fire Commissioner in November, 1883, by Mayor Edson, to fill the unexpired term of John J. Gorman, appointed Police Justice. He was reappointed for a full term of six years, in 1887, by Mayor Abram S. Hewitt. He resigned as Fire Commissioner, and was appointed Chamberlain of the City of New York by Mayor Grant on April 7, 1889, and resigned, on account of illness, in February, 1890.

From 1887 to 1894 Mr. Croker was the recognized leader of the Tammany Hall Democracy. He was the shrewdest, most far-sighted, the ablest, most popular, and successful leader Tammany Hall has had within the last forty years.

to look after the regular Democratic tickets, as I had heard that there was a crowd of roughs to be brought there by James O'Brien to destroy the Tammany ticket and beat the Tammany men. I was met by Mr. O'Brien and his crowd and assaulted by him. Some words passed between us, resulting in a blow from him. With me were the two Hiekeys and Mr. Sheridan; there was a crowd with Mr. O'Brien; they urged him to strike me. I only had words with him. I told him that all we wanted was fair play, and did not wish to have our men driven out of the district by thieves that he had brought there. Previous to this one of his crowd and his own brother, Larry O'Brien, had been arrested for assaulting our men. The fight was general, and shots were fired—some three or four. I don't know who fired, or what side they came from, but I did not fire, as *I never carried a pistol in my life*. The police came up, and I asked to have O'Brien arrested, but they refused. I do not know John McKenna, the injured man, nor do I know who shot him.'"

The following statement was made by Mr. Hewitt at a meeting of the Tammany Hall General Committee, November 5, 1874, according to the report of its proceedings in the New York *Herald* of November 6, 1874:

"Mr. A. S. Hewitt was the next speaker. He spoke in strong terms of the recent election outrage. He said that the man James O'Brien, who had nominated himself as his opponent, had boasted that he would be returned by a majority of ten thousand, and he felt assured that if murder would have served his opponent's purpose it would have been done. It was the last thought of his mind that such a contest would have been forced upon him. Mr. Hewitt having stated that he had given word to the police of an apprehended attack on his political supporters, and that the police failed to appear and discharge their duty, said, much as he regretted the unhappy occurrence that took place on Election Day, he believed that *if it had not occurred Mr.*

O'Brien would have been returned in place of himself, and there would have been thus returned to the national council the representative of the mob. He (Mr. Hewitt) took some pains to get at the facts in this case, and from disinterested witnesses he was able to say that it would be shown that the attack on that occasion was made by James O'Brien, and not by Coroner Croker. Coroner Croker had no pistol on that occasion and never drew one.

“*A voice.* ‘He never carried one in his life.’

“Mr. Hewitt said that he knew Mr. Croker drew no pistol, and that when pistols were drawn they were drawn by the opposite side. He did not underestimate the difficulty of the contest. He went into no grog-shops, and treated no crowd of hired ruffians. He used no money to buy votes, but what he did was to protect the honest voter in his right to deposit his ballot, whether it was for him or against him.

“Mr. Kelly said that Mr. Hewitt had spoken truly about hired ruffians going up the Avenue. That was all true. Mr. Croker was not an aggressor. What he did was done with a view to protect the ballot-box. Mr. Hewitt said the evidence on this point was overwhelming, and he believed that *but for the firmness of Richard Croker, James O'Brien would have got the certificate of election.*”

Coroner Croker was indicted for the murder of McKenna; and his trial commenced on the 7th of December, 1874, in the New York Oyer and Terminer, Judge Barrett presiding. The prosecution was conducted by District Attorney B. K. Phelps and Assistant District Attorney D. G. Rollins. The defence was conducted by John R. Fellows, George W. Wingate, and Mr. Clinton. On the 11th of December, the testimony on both sides having closed, Mr. Clinton delivered the following address to the jury:

“*May it please the Court—Gentlemen of the Jury:*

“I congratulate you that the time is near when you will be relieved from the imprisonment which you have

been compelled to suffer in the discharge of your duty in the cause of public justice. I have never risen to address a jury under circumstances like the present, where I felt that my effort would be entirely a work of supererogation ; where all the facts developed upon the trial were so conclusive upon the side which I was called upon to defend that it seemed an utter waste of time to delay the rendition of a verdict. And yet, gentlemen, as this is a capital case—or, rather, as the charge against this defendant is capital—Counsel might be thought wanting in their duty did they not at least go through the form of presenting to you their respective sides by way of argument. As it is late in the week—late in the last day of the week—and I know how anxious you must be after a week's absence from your respective families to return to them, I shall endeavor to occupy but little of your time. I shall only call your attention to a very few of the principal points.

“On Election Day, early in the morning, certain parties got together. We have not been permitted to—and perhaps it was not proper, in view of the course the case finally took, that we should—go into evidence to show you in detail the scheme concocted for the purpose of driving voters from the polls and preventing them from electing or voting for the man of their choice for Congress. Yet we have throughout the evidence shown enough to enable you to readily understand what that scheme was ; and in my observations I shall only allude to facts established by the testimony. It does appear in evidence that certain parties met on the night preceding the election ; they met at a nameless place. The object was to arrange for the operations of the next day. The first you hear of their movements on election morning is that those in charge of polling booths, those in charge of the boxes in Second Avenue, in the interest of a par-

ticular Congressional candidate, Mr. Abram S. Hewitt, whom you all know—and know favorably—by reputation or personally, were driven from the polls. Thus a system of violence was inaugurated. It has been proven that as early as seven or a quarter before seven Mr. Casey was driven from the polls. Scenes of violence occurred in the vicinity where he was stationed. It is shown in one case that one of the brothers of the opposing candidate for Congress took part, and in another instance another brother participated, in acts of violence. Who were those who on this occasion congregated for such a purpose? According to the testimony of the witnesses for the prosecution, they were such men as Owney Geoghegan, and others whose names you have heard. They assembled for the express purpose of violence. The character of the contemplated violence you may readily infer from circumstances appearing in the case. Coroner Croker, a prominent member of one political organization, in pursuance of his duty on the morning of election, went to that portion of the city, taking with him a number of men for the purpose of leaving them at the various polling booths where men of that organization had been driven away. When he arrived in Second Avenue, at the corner of Thirty-fourth Street, or near there, he had but three men with him—the Messrs. Hickey and Mr. Sheridan. He was in the peaceful discharge of his duty. But before I go to that branch of the case I will call your attention to a little of the evidence on the part of the prosecution respecting preliminary matters. It does appear, as I said, that Mr. Casey was beaten by Mr. Lawrence O'Brien, and for that offence the latter was arrested. It appears by the evidence of the prosecution that six or seven other men of the gang were with him at that time, and among them was Borst. He was one of those who were enacting these scenes of depredation and violence. Borst himself

tells you that on that morning he took with him Costello, known as 'Strong-armed Mike.'

"Now, gentlemen, you have, in the first place, Borst, Costello, and the rest of the gang in Second Avenue, near Thirty-fourth Street, engaged in acts of violence—inflicting violence upon peaceful, unoffending citizens, whose only object was to promote the interests of Mr. Hewitt and to secure the votes of citizens who desired to cast their ballots for him. You may infer from the evidence that Mr. Croker heard of these acts of violence. For the purpose of characterizing this proceeding, and showing you the kind of operations that were being performed, I will read a few lines from Stephen O'Brien's testimony. He says:

" 'I had that morning a little difficulty.'

" *Question.* 'Where?'

" *Answer.* 'On the corner of Thirty-fourth Street.'

" *Q.* 'With whom?'

" *A.* 'A man named Mike Geoghegan.' [That is, a little after seven o'clock.]

" *Q.* 'Did you have any disturbance that morning?'

" *A.* 'Not that I know of. A man by the name of Clifford, me and him had *a little jaw.*'

" *Q.* 'Any blows struck?'

" *A.* 'Yes; I believe I *tripped* him—I believe I tripped at him.'

"I call attention, gentlemen, to these preliminary circumstances for the purpose of justifying the action of Coroner Croker, which was peaceful upon that occasion. Mr. Croker, having charge of the men who were to have supervision of the polling booths in that part of the city, in the honest discharge of his duty, as requested (as you have a right to infer) by those whose business it was to give directions in these matters, went to Second Avenue for the purpose of protecting the men who were engaged

at the polling-booths and at the boxes. He went there for the most peaceful purpose, contemplating no violence of any kind—a man who, as the testimony shows (and that appears but from one witness, Mr. David Daly), never carries a pistol or weapon of any kind—Croker went there, and what did he do? He found there this man Borst, who had been engaged, as you have a right to believe, and as I think the testimony shows, in the scenes of violence but half or three-quarters of an hour before in that exact locality. Borst, you observed upon the witness stand, was a well-dressed man, who appeared to understand what he was about. Does Croker engage in any acts of violence with him? Not at all. Croker had a right to believe, and did believe, that Borst was the leader of this gang. Mr. Croker, thus believing, addresses him and says—what? He says in substance, ‘You ought to be ashamed of yourself; you don’t belong in this district; you should go away from here’; and he said to him further, understanding the meaning of the language, ‘You must,’ or ‘You ought, to take your thieves away.’ Now what did he mean? Mr. Croker said that in a calm, mild, gentle tone of voice, but with decision of character. Did Mr. Borst and Mr. Costello resent this language? Not at all. Had they been there for any honest purpose; had the rest of the gang, including Geoghegan and the others, whom you have heard described by peculiar appellations, not been of the character indicated by Mr. Croker, do you believe Mr. Borst would not have resented the insinuation, or rather the direct charge, made by Mr. Croker? Does Mr. Borst say indignantly, ‘I have got no thieves here; I have had nothing to do with acts of violence. How dare you use such insulting language to me?’ No, he takes it, and Costello takes it, quietly, as a well-deserved rebuke. This language had peculiar significance. If the gangs of thieves had not been there for purposes of violence,

do you believe these men would have submitted to such an accusation as that—not even resenting it? You may infer they were capable of resenting it. A gang of six or seven, and you do not know how many more, had been there before—half or three-quarters of an hour before; they were within beck and call—within easy reach. Croker had but two or three with him; but there were Costello—Strong-armed Mike—and Borst, and we know not how many more who were able to cope with Croker and all he might have near him. What is done? Mr. Costello does not resent the language of Croker. The conduct of Borst and Costello amounted to a concession that the charge was true. You have heard enough as to the character of the men engaged in these acts of violence. You heard one witness for the prosecution deny that they assembled at a particular place. You heard other witnesses for the prosecution admit that they did; that they were there, that they assembled at that place, that they departed from that place in various directions, and operated in a way to suit their own purposes.

“Under such circumstances Mr. Croker, as I have said, told this man Borst to take that class of men away. Was he wrong in that? Was not Mr. Croker acting the part of a good citizen? Is the doctrine to be inaugurated that if ruffians, for the purpose of electing a particular candidate, see fit to smash boxes and to drive innocent, peaceable men from polling-booths, they shall be permitted to do so, and that citizens shall not be allowed to vote for men whom they desire to elect, or if they attempt to vote they shall do so at the forfeit of their lives? Are such scenes of violence to be inaugurated here? If such outrages are not to be permitted, what more did Mr. Croker do than he ought to have done? He expostulated with these men; he said to them, ‘Stop this course of procedure; it leads to the

state-prison'; he might have added, it leads to the gallows. He gave them kind, friendly advice; told them to go away. What followed? The men who had but half an hour before engaged in acts of ruffianism were not content; their appetites for violence were whetted by the proceedings of the preceding three-quarters of an hour.

"They had driven many away from the polls; they were engaged in this nefarious business on that occasion. And what did they do? Did they depart peaceably? No. The Congressional candidate whose cause they were serving was near, and although he tells you he got on the car and went from between Lexington and Third Avenues to the corner of Second Avenue, and there got on another car, and from the platform of that car he observed Mr. Borst beckon to him, yet Mr. Borst said he was not upon the car when he beckoned to him. Why did he beckon to James O'Brien to come to that place? For the express purpose of precipitating violence. Borst brought James O'Brien to the scene of action. At this time Mr. Croker was performing the part of a peaceful citizen; he was not maltreating anybody; he was guilty of no violence; he was there in the honest discharge of his duties; he was performing them faithfully, kindly, and firmly. Why was it that these men who had been engaged in deeds of violence half an hour before called James O'Brien there? Was not this the reason—that they were with their gangs? Mr. Croker was walking peacefully along; he had but three men with him; they had nobody knows how many; they had Croker now where they wanted him. What was Mr. Croker to do? He had been opposed to James O'Brien for several years; they had both occupied official positions in that ward. At one time they had been intimately connected with the same political organization. Was it Mr. Croker's business, when Mr.

James O'Brien approached him and saluted him with a volley of epithets, to run like a coward? Was it his business to flee? Not at all. What does he do? He quietly stands still; he maintains his ground. When Mr. O'Brien poured forth a volley of epithets at him, he retorted in language somewhat akin to that used by his antagonist; he acted on the defensive. We would have selected choicer language, perhaps. If we had been engaged in what they call the "*argument*," we would not have used the epithets employed on that occasion. Mr. Croker then does nothing but return word for word; he returns epithet for epithet; then Mr. James O'Brien, in the phrase of a certain class of men, 'went for him.' Mr. James O'Brien then struck Croker; the latter returned the blow with his fist.

"The District Attorney has conceded that he will not seek to hold Mr. Croker liable for any acts except his own, and therefore it will not be necessary for me to show at length, as I might otherwise have been compelled to do, the various acts and the course of conduct of those who were with him. Now, gentlemen, I ask you to bear this in mind at the outset, that by the confession of O'Brien himself and all his witnesses, *O'Brien began this affray*. Mr. Croker acted on the *defensive*, according to the testimony of the prosecution. Mr. O'Brien commenced the violence. What had Mr. O'Brien to do with Borst and Strong-armed Mike and the rest of them, with whom he rushed to the scene, unless they were engaged in his work? Why should he interfere? Why should Borst beckon to him? And when he had beckoned to him, when O'Brien could see that Mr. Croker was guilty of no violence whatever, why should Mr. O'Brien rush to the scene if it were not for the settled purpose of inaugurating violence.

"But, gentlemen, the question presented to you here is simply—Did Coroner Croker fire the fatal shot which

resulted in the death of John McKenna? That he did not appears from all the evidence in this case—even that of the prosecution when properly construed. Who swears that he did? Who is the man of all this crowd of witnesses who swears that Richard Croker fired the fatal shot? But one solitary witness out of something like twenty or thirty who have given their evidence before you, and the man who swears to it is the one who was likely to have been the most confused; who, if he intended to tell the truth, had the poorest opportunity for observation. Gentlemen, such is the testimony presented on the part of the prosecution. James O'Brien, who had been struck in the mouth, who was bleeding, as he tells you, and who, as all the witnesses say, was greatly excited, testified that at that moment, after Coroner Croker struck him, he (Croker) turned around coolly and deliberately took aim at the head of John McKenna, and shot him down upon the spot. Every one of you knows, as far as any one can know from human evidence, that no such thing occurred.

“As my friend and able associate said in opening the case to you, how could Coroner Croker perform an act like that? No one has called him an unkind man; no one has called him a dastardly coward, that he should turn from the foe who was reeling and staggering from his well-directed blows, and from sheer malignity aim a pistol at a man of whom he had never heard, whom he had never before seen, and slay him in cold blood. Why, if there were no other evidence in the case than that of James O'Brien, I would go to the jury with entire confidence that upon his testimony alone they would say that such a statement was incorrect, that it could not by human possibility be true. Would any man perform an act like that? Men act from *motives*. What conceivable motive could Croker have to aim at an inoffensive man and shoot him down?

“Who next swears aggravation into the case? Stephen O'Brien. He tells you that no other man on the spot could have shot McKenna. That is his argument. Then two or three claim that Mr. Croker on that occasion had a pistol. Costello and the boy Heally so state. One of the witnesses who did not swear that Croker had a pistol stated that he saw something shining in his hand, which, of course, meant a pistol. Now you have heard all these circumstances detailed at great length; you have heard much about the position of those parties; you have had it proved by witness after witness that O'Brien and Croker were engaged in a combat—that they were clinched until *after* the fatal shot was fired. But in this connection I call your attention to only one witness. When a witness states a fact—a leading fact—which is not true, all the surrounding facts and circumstances will be so out of harmony with it that a jury cannot fail to see the truth.

“Now we have a right to use the testimony of James O'Brien so far as it proves a part of our case, and were there no other witness our entire case would be proved by a single extract from his evidence, to which I call your attention. He says: *'I had my eye on Croker, because he was following me all the time.'* In substance, he said, 'I had my eye on Croker all the time, and Croker had his eye on me.' Mr. O'Brien had forgotten for the moment the main fact he swore to—that Croker had turned from him and followed McKenna; that he had shot in the direction of McKenna; and yet before he left the stand, whether in direct or cross-examination I do not remember, *James O'Brien proved the entire truth of this defence.* He proved that he and Croker were engaged together, each having his eye upon the other until after the fatal shot was given. He says, in substance: 'Our eyes were on each other all the time.' Gentlemen, *that is the truth!* There is no question

about it. Those two were the combatants towards whom all eyes were directed. They were watching each other, and I tell you that neither James O'Brien nor Richard Croker could have taken his eye off his antagonist during that affray without each changing his entire nature. Do you suppose that these men, in an affray of that kind, they being the leaders of opposing factions, at that time engaged in a personal encounter, interchanging blows with clinched fists—do you believe either would take his eye off the other until the affray was over? Why, Croker would have to change his entire nature; James O'Brien would be compelled to change his entire nature in order to do that. They could not help keeping their eyes on each other until the entire disturbance was over. This, if I proceeded no further, is an end of the prosecution's case. James O'Brien has proved the truth of our defence beyond all peradventure. I will not call your attention to his remark that before the Coroner's Jury he had no confidence in his own evidence. When James O'Brien states that which I have read to you, *we* have confidence in the truth of that portion of his evidence. It came out naturally. He did not perceive the effect of it. Now what further appears here? There are certain features in the case which indicate the truth beyond possibility of mistake.

"In order to make a case against Croker, it was necessary to swear that he was the aggressor. Mr. O'Brien tells you that he on that occasion was peaceful, that although he was struck in the mouth by Croker and the blood flowed freely, his lips being thus brought against his teeth, *he did not resent it*; that he backed away, quiet as a lamb, pocketed the affront, and called on the police for protection. Is there anything in this evidence which justifies you in the belief that James O'Brien did not stand up front to front with Croker? O'Brien tells you he did not strike a blow on that occasion.

“What do his witnesses say? *Every witness for the prosecution either says nothing upon the subject or states that O'Brien did strike.* Costello says that he saw O'Brien strike Croker; after that they clinched. What does a 'clinch' mean? These men understood the meaning of that phrase. We know to what they refer. Downey, O'Brien's witness, says that O'Brien hit Croker.

“I will read an extract from his testimony; both of them hit, he says.

“*Question.* ‘Hit each other?’

“*Answer.* ‘Yes, sir.’

“*Q.* ‘Croker and O'Brien?’

“*A.* ‘Yes, sir.’

“Now what are you to think of a case which hinges upon testimony like that of O'Brien? James O'Brien is not supported by a solitary witness on the part of the defence or the prosecution. Every witness who had an opportunity of seeing said that O'Brien *did strike*. And why was it necessary to make it appear that he did not strike? That was the prosecution's case; but, then, the witnesses for the prosecution contradict him. Remember, gentlemen (as I will show you before I have done) there is not a scintilla of evidence in this case to make the prosecution even plausible, except the direct testimony of James O'Brien. There is not a particle of evidence, aside from the positive declarations of James O'Brien, that Coroner Croker inflicted any violence upon that occasion, except with his clinched fists.

“It is important, therefore, for you to know whether O'Brien's testimony is to weigh against all the other evidence in the case. What more of aggravation is attempted to be sworn into this case? James and Stephen O'Brien both seek to make you believe that Croker not only had a pistol, but that he passed it to Hickey. One,

if I mistake not, tries to make you believe that Croker put the pistol in his pocket. The evidence is conflicting as to the position of Hickey on this occasion. I think a preponderance of evidence shows that he was at a considerable distance from the scene of the affray; but on that fact I do not lay any stress in this portion of my argument.

“ Here, then, you have some of the leading features of the evidence on the part of the prosecution. Had we rested our case without calling a witness, it would have been your duty to render a verdict of not guilty. But, gentlemen, this is not a case where we desire simply a verdict of not guilty. We intend to vindicate Coroner Croker—a foully traduced man. It would be better for this city if there were more men who, by all peaceful and lawful means, would see that frauds were not perpetrated upon the ballot-box—that every unoffending citizen was allowed to go to the polls and deposit his ballot without interference, and that those who engaged in the interests of the respective parties—properly engaged in attending at the polling-booths, distributing their tickets—were protected in the discharge of their duties. I repeat, as the case stood when the prosecution ended, there was nothing but the naked statement of James O’Brien even tending to implicate Coroner Croker; because if he had a pistol (which he had not), that would not have proved that he used the pistol and fired the fatal shot, any more than the fact that if some of the magistrates of our city happened to be where an affray occurred and had pistols in their pockets would prove that they were guilty of homicide. Why this effort to show that Coroner Croker had a pistol and could have slain the deceased? If he had a pistol, does that fact prove that he fired the fatal shot? It no more proves that he did it than it is proved that any one of the crowd—other than Croker—inflicted the blow upon

James O'Brien's face, because he had an arm and could have used his clinched fist. The argument would be equally good to convict *any one* who happened to be in the crowd of assault and battery upon James O'Brien. Why, the prosecution have proceeded, not upon the idea that they must prove Mr. Croker guilty, but that if by any human possibility he could have fired that shot they would have him convicted and executed. Have they forgotten that it is their duty to prove their case, and that they must prove it by satisfactory evidence; not only by a preponderance of evidence, but by evidence which leaves no rational, well-founded doubt in the minds of the jury?

"I will next call your attention to the conduct of the unfortunate deceased upon that occasion. Some of the witnesses knew McKenna. I will invite your attention to those witnesses on the part of the prosecution and defence who were acquainted with him, as well as those who had no previous acquaintance with him, but observed his course at that time. Borst says that 'McKenna rushed at Hickey, and as he did I heard a pistol-shot, and saw McKenna take two or three staggering steps from the curb into the street, Hickey in front of him. McKenna retreated back and fell.'

"He says 'that Croker had one foot in the gutter and one foot on the curb.' Now Rourke, a witness for the defence, says he saw McKenna come from the northeast corner of Thirty-fourth Street and Second Avenue; that he ran for a man standing near O'Brien and Croker, and made a grab at him and missed; that he ran as fast as he could. Mr. Carr says that McKenna ran for a man who had a pistol. Gentlemen, I may have omitted something, but I think that is substantially the evidence as to the direction from which McKenna came and the direction in which he went. In respect to that there is something of harmony in the testimony of the

witnesses on both sides. Whether they are correct it is impossible to tell. One witness, you remember, stated that McKenna came from the northeast corner of Thirty-fourth Street and Second Avenue. I do not call to mind at this moment the name of that witness."

Mr. Wingate. "Rourke."

Mr. Clinton. "Rourke, my associate says, is his name. Now when you have got McKenna there, according to some of the evidence on both sides, he rushed up violently to *some* person. That is a portion of the testimony. There is nothing to show — there is not a particle of evidence in the case rendering it even plausible — that Mr. Croker ever knew there was such a man as McKenna in existence until after he fell from the fatal shot.

"Who caused McKenna's death? It does not devolve upon the defence to prove that fact; yet, gentlemen, we have done it. And why? Because while we are here to defend our client, my associates and I considered it our duty to put upon the stand all persons present at the affray whom we could get into Court by compulsory process to state from their different points of view all they observed upon that occasion. We have been able to prove, not by name, because not even the witness, nor any one, so far as I am aware, had any idea who the man was, but we have shown to you that a person other than this defendant did shoot McKenna. It is enough for us to prove that Mr. Croker did not. Now what is the proof upon this subject? Two witnesses, Mr. Carr and Mr. Rourke, testified that they saw McKenna go in a particular direction—go into Second Avenue—go into the street beyond the curb-stone, towards the railroad track; and while there, one of these witnesses says that he ran up apparently against a man who had a pistol. I think another man, possibly the same witness, says that he grabbed at that man, and

that man fired a pistol *and McKenna instantly fell*. Now we have proved that that person, whoever he was, shot McKenna. We have proved it by four or five witnesses. We have proved it by the witness who saw him come from the northeast corner of Second Avenue and Thirty-fourth Street, and go in the direction I have named; we have proved it by two witnesses who looked on and saw a pistol pointed in the direction of his head; we have proved it by those who saw the pistol fired and observed that he (McKenna) instantly fell. We have proved it by a variety of other witnesses—I will not stop to call them by name—who state that they looked in that direction, saw the shot fired, and observed the smoke rise from that identical spot, or in that immediate vicinity, where the other witnesses tell you this man fired, and McKenna dropped. All the testimony shows that Coroner Croker was in a different position. Here, then, will this prosecution tell you in the same breath that, upon the naked assertion of James O'Brien, contradicted by twenty or more eye-witnesses—disinterested witnesses—that upon his naked assertion you shall convict Coroner Croker, because he (O'Brien), an interested party—the most interested of any of the parties—says that he saw him fire that shot, when it is proved by four or five or six or more disinterested witnesses—eye-witnesses—that another man, in a different location, fired the shot before their eyes, and they saw McKenna fall? Will the prosecution tell you that the latter fact, proved by four or five or six disinterested witnesses, is not established, and that the assertion of James O'Brien that Croker fired, contradicted by twenty or more witnesses, is to prevail? No, gentlemen! no! Are rules of evidence to be reversed in this Court? Is the machinery of the law to be converted into an engine of persecution? Is an innocent man to be hunted to imprisonment or death, *because he had the courage to manfully dis-*

charge the duties which private citizens ought always to perform? And are you to brand twenty or thirty witnesses with perjury because, without any interest on their part, they were brought into Court, and before their God told the truth honestly and faithfully? Why, gentlemen, you can appreciate why I say that any argument in this case is a work of supererogation.

“What motive have any of these witnesses to testify otherwise than truly? You have seen them all; they have been subjected to a merciless cross-examination, and yet I could not say that I regretted it, disagreeable as it was to them, because it brought out in bold relief the truth of their testimony; it brought out the proof of their integrity beyond all question; for while they differed on unimportant details—as all the witnesses for the prosecution and the defence have differed—yet as to the main facts their evidence was entirely reliable. Gentlemen, a moment ago I asked what motive could these witnesses have? None at all. On the other hand, what motive has the one witness, the solitary witness who appears here and swears that he saw Coroner Croker fire the fatal shot? He has every motive. Does he not desire to get rid of such an adversary as Coroner Croker? What greater motive could he have? The effect of that upon his mind I leave you to judge. Having shown you the incorrectness—to use a very mild term—of the evidence of the principal witness for the prosecution; having shown you that he is contradicted by all the witnesses and by the conceded facts in the case; having shown you that he was the aggressor in this fight—that he inaugurated it; having shown you that another man fired the fatal shot, I will now proceed to another branch of the case, and although it is not necessary, it is not important, that we establish this position, yet as it does appear from a preponderance of evidence it is my duty to call your attention to it.

“Coroner Croker’s position was such that even if he had in his possession a pistol he could by no human possibility have fired the ball which entered the head of McKenna. I will not take up your time by going into details, because it is not necessary ; but if it were, if the case turned upon that, I would, even at the risk of occupying your time longer than I should desire, analyze the testimony and show you, from reliable evidence in the case, that Coroner Croker’s position was such that from the fact that the left side of the deceased was towards him, the wound could not have been inflicted by him—the fatal wound—where it was, namely, immediately over the right ear, two inches back of the ear. I will, in passing, call your attention to some of the witnesses who establish the fact that Coroner Croker was in that position, McKenna being to the north of him—that is, nearer to Thirty-fourth Street than he ; that fact was proved by the witnesses Lusk, Somars, Britt, Rourke, Carr, Palmer, Mahony, and O’Keefe. This fact is proved by nine or ten or a dozen witnesses, who had the very best opportunities of observing, who were right on the spot, whose positions were such that they would not be likely to be mistaken on that point. They state that McKenna was to the north of Croker ; and if my memory serves me right, it appears by the evidence of the prosecution, as given on the Coroner’s inquest by the same witnesses who testify here, that such were the relative positions of Croker and McKenna ; although some of them denied it here, yet by the extracts from their evidence which they admitted to be true, I think they substantially stated that they gave a contrary statement before the Coroner. But no matter ; assume that they did not, for the purpose of argument, then you have it established by a preponderance of evidence—by a majority of the witnesses—that Croker’s position was such that by no human possibility, if he had a pistol in

his hand, could he have fired the fatal shot. If there were no direct evidence on the subject this circumstance would be of very great importance. Circumstantial evidence is sometimes more important than positive, for the reason that crimes are perpetrated in secret; and it is rare, in regard to many crimes, that direct proof can be given. Forgeries, larcenies, burglaries are usually committed in secret; no eye-witnesses are called, and therefore circumstances which, dovetailed together, point to a certain conclusion are of the very highest importance. Although the relative position of the parties is an important and a strong circumstance, which of itself would be conclusive in this case, because if there be any reasonable doubt as to the establishment of any one proposition which is necessary to constitute a link in the chain of evidence showing guilt, then the case of the people fails; yet in this particular case I shall not dwell upon this feature of it as I would were there not so much direct evidence upon the subject. This fact is established by a preponderance of evidence. Some of the witnesses for the defence locate McKenna south of Croker; and, gentlemen, it would be strange indeed in a case like this if witnesses were not, some of them, mistaken in regard to the position of the deceased. And why? Because their attention was concentrated upon O'Brien and Croker, and, up to the time that McKenna fell, their attention was not riveted upon him, with the exception of a very few witnesses; even with respect to them their principal attention was fastened upon the two combatants to whom I have alluded. Therefore it would be most extraordinary if the witnesses did not differ as to the relative positions of the deceased and Mr. Croker.

“The learned Assistant District Attorney, who opened this case with marked ability, stated to you with entire correctness that in all cases of this kind great discrepan-

cies necessarily appear in the evidence. He stated very correctly the reason why that feature always accompanies every case of this kind, and the more you think of it the more convinced you will be of the truth of that observation. It is confirmed in respect to the witnesses on the other side and in regard to ours. Why? While witnesses observe the chief scenes—the principal combatants—the main facts transpire so quickly that their attention is not riveted upon the minor details. One stands in one position, another in another; one sees one circumstance, another observes other facts; one observes one thing and another something else; so it is always. I venture to say that if a startling fact of any kind were to occur in this room, if any one were shot down, or if any one fell to the floor from heart disease or apoplexy, and it were necessary to prove the circumstances surrounding the casualty, while witnesses might not differ as to most of the main facts, yet in regard to minor details hardly any two would agree in every respect. But, gentlemen, in regard to certain facts witnesses cannot well be mistaken. Bear in mind that these transactions at the time of this homicide occurred probably much quicker than the witnesses themselves supposed. I do not believe five minutes were occupied from the time the two combatants met until the fatal shot was fired. I do not believe two minutes elapsed; yet my opinion is not as good as yours, and may not be correct. You observed the experiment of my learned associate asking a witness to wait until a minute had elapsed. Silence prevailed in the court-room. Persons came in and went out. Various incidents occurred, and had any one of us been called to state how long a time had passed, I think we would have said three or four minutes, instead of one. It seemed a very long minute.

“On the occasion of this homicide the principal facts transpired in a very short space of time. They were

sudden, and therefore it is not in the least strange that there is a wide discrepancy in regard to the details of the evidence. There is one fact in regard to which nearly, but not all, the witnesses agree, and that is that McKenna fell upon the street, that his feet were several feet from the curb-stone. Some witnesses say that he fell about midway between the curb-stone and the railroad track. Others place him nearer to the track or nearer to the curb-stone; and yet nearly all the witnesses agree in this, that he was much farther to the west than Croker, and therefore it would be highly improbable that Croker, even if the deceased were to the south of him, should turn around and fire in that direction. Bear in mind, too, that the attention of these witnesses was all concentrated upon O'Brien and Croker, particularly concentrated upon them because the parties who knew them and saw them come together felt that there was danger of violence. It was a notable incident in that part of the city that they should come together. When blows were interchanged, and this fight was observed, then the eyes of all were fixed upon them more intently than ever. But why concentrate attention *upon their hands*? Why is it, the District Attorney may ask, that the witnesses speak so positively in regard to the fact that neither Croker nor O'Brien—and they make no distinction between the two—had a pistol or weapon of any kind in his hand? Why is it? The learned District Attorney and his Assistant cross-examined these witnesses with great severity, as though it were an extraordinary circumstance that their eyes should be fixed upon the *hands* of Croker and O'Brien. It was not at all surprising. Those men were fighting with their *hands*, fighting with their *clinchd fists*. They had grappled with each other; they had struck each other, and for that reason the attention of all the witnesses was concentrated upon their hands. The witnesses were

looking to see if the combatants would strike more blows after one or two had been interchanged; and it was, therefore, the most natural thing in the world that they should observe just what they say they did.

“Now, gentlemen, I propose to call your attention to the fact that we have proved—it would have been enough if the prosecution had failed to prove that Coroner Croker fired the fatal pistol—we have proved by the most positive and overwhelming testimony that he did not do it.

“The learned Assistant District Attorney said when he opened the case that if one man sees an occurrence and twenty or one hundred do not see it, why bring up the parties who did not see it to outweigh the testimony of him who did? He gave an illustration which I will not repeat. Gentlemen, there is a rule of evidence that, under certain circumstances, affirmative testimony outweighs negative. Yet it has no application in a case of this kind. The elementary books on evidence lay down the rule that if two persons are watching to see whether a particular fact takes place, the evidence of the one that the fact did not occur is entitled to as much weight as that of the other that it did. And I recall the illustration given in the books on evidence—I think in ‘Greenleaf’—that if two persons are listening to hear if a clock strikes, the evidence of the one who says it did not strike is as good as that of the other who says it did, because their attention is especially directed to that particular subject. But if one is watching to hear if the clock strikes and the other is engaged in conversation and pays no attention to the clock, and does not hear it strike, then the testimony of the latter would have little or no weight compared with that of the former. Now take this case; it is not negative testimony; it is positive testimony upon which we rely. Why, gentlemen, at this moment I am engaging your attention;

every one of you is listening to me, looking at me, and paying attention to the observations I make; suppose it should be charged a week hence, that at this moment I fired a pistol at my associate—shot him dead—and suppose, out of this vast crowd here one man alone should come upon the stand and swear to that crime against me, swear that he saw me deliberately aim my pistol, fire, and my associate fall dead at my feet; and suppose I should call every one of you, his Honor upon the Bench, my learned opponents here, every man in this audience, to prove that no such fact occurred—yet, according to the argument of the learned District Attorney, or his Assistant, the evidence of the man who swore to the fact that was not true would have to outweigh the evidence of all in this room. The proposition was so monstrous, when applied to a case like this, that I regretted that my learned friend stated it. I can hardly think he meant it in any sense that could by possibility apply to this case.

“Now bear in mind that all these witnesses to whose evidence I am directing your attention were present, viewing Croker and O’Brien as intently as you are now viewing me, watching with intense earnestness to see what they did.

“How is an innocent man to prove his innocence? One man alone comes on the stand and swears that in cold blood he shot down a peaceful citizen—one man alone, one solitary witness, comes and swears to that. And yet it so happens that upon that occasion—in that immediate vicinity—there were scores of witnesses, many of whose names we have ascertained, who saw what occurred, and who come into Court and prove by the most positive and conclusive testimony that the man charged had no weapon and did not shoot. They know it; they were eye-witnesses.

“Why, gentlemen, I have never known a case, I have

never read a case, there is no reported case in the books in this country or in England, whence we derive most of our law—if you go back hundreds of years you will find no case—where, under such circumstances, any prosecuting officer has ever asked a conviction at the hands of a jury. Never has such a case arisen before; because the law is that even if there be reasonable doubt as to whether guilt has been proved, there shall be an acquittal. But here, where there is no doubt whatever, where the evidence within reach of the prosecution shows (and it is proved before you that most of these witnesses testified at a Coroner's inquest), where the testimony of nine-tenths of the witnesses proves beyond all doubt that the man is innocent, yet, on the testimony of a solitary witness, a District Attorney—or a Grand Jury, I should say—indict a man; he is thrown into prison, compelled to herd with criminals until, after his long-continued demand and pertinacious clamor for a trial, he finally secures it. What a spectacle! where men by the score, citizens of the highest character, of every grade in life—the mechanic, the merchant, the experienced and distinguished boatman—men of all occupations, of every stripe of politics who accidentally happened there, prove beyond all peradventure that the man is innocent, that he did nothing but his duty; and yet the spectacle is presented of a prosecution asking for a conviction!

“Gentlemen, I am thankful that the case is in your hands. We are devoutly thankful that we have been able to get a trial, even as speedily as we have; for this man asked no favor except that his case should be brought to trial before an intelligent and honest jury, who would be governed by the evidence and discharge their duties conscientiously. Gentlemen, our testimony is not confined to those engaged for one party or the other in this contest on Election Day. We have called

all the friends and the opponents of every candidate to give their evidence before you. I call your attention first to the testimony of that man whom you all probably know by reputation, a man of high character and integrity, Mr. John Biglin. He was present on this occasion, observed all that transpired; he was working in the interest of his brother, the present Republican member of Assembly, who continues such until the 1st of January. He was present at the scene of this disturbance, or in that locality, during the entire day. He witnessed the whole disturbance, having been upon the spot; having been intently engaged in looking at Coroner Croker at the time, he speaks from positive personal knowledge; he tells you that by no possibility could he be mistaken; under the solemnity of his oath he tells you that Coroner Croker had no pistol in his hand; that he did not fire the fatal shot, or any shot; and that *the man fell while Coroner Croker and James O'Brien were engaged in mutual combat*. Bear in mind that this is a witness who does not belong to the party with which Coroner Croker is associated. He was subpoenaed here by the prosecution, and called by us. Were there no other testimony here than that of John Biglin, I would be content to leave this case with you upon that testimony. He cannot be mistaken. I was glad to see that the jury put such questions to him as they thought proper to elicit the truth. A number of you examined him with considerable detail; my opponent and I examined him thoroughly upon the witness stand; and, gentlemen, I did not regret neither your examination—I was thankful for it—nor the protracted cross-examination of my learned friend the District Attorney; because it brought out in bold relief the truth that this man Croker was innocent; that by no human possibility could he have been guilty of this offence. I will not take up your time by going into a detailed description of

the positions occupied by him and the parties at that time; you remember how near he was to them—close by them—within three or four feet of them; looking directly into Coroner Croker's face; *looking directly at his hands at the time the fatal shot was fired*; he tells you that Coroner Croker had no pistol, could not have fired without his seeing it, and that he *did not fire*. Bear in mind also, gentlemen, that witnesses observe with accuracy somewhat according to their mental discipline, habits of mind, and peculiarities. One witness may get confused in a scene of this kind, another may be cool. It must have been evident to you that Biglin observed with great coolness, with extraordinary clear-headedness, so to speak. You must have observed from his evidence that he watched closely what occurred; he knew both parties; he knew O'Brien, he knew Croker; he had been acquainted with them both for years, and, as far as I am aware, I think he so stated; he was on friendly terms with both. His relations with them now are friendly; he has no motive whatever to misstate the facts. I submit, therefore, that his evidence is conclusive.

“He told you he was looking at Croker's hands; and, in response to the direct question put by my associate, he stated in substance that by no human possibility could that shot have been fired by Mr. Croker without his observing it. My associate asked him, ‘Could you see Coroner Croker and his hands as well as you see me and my hands at this moment?’ and he said, most emphatically, ‘Yes.’ Now what more is wanted? To the same effect is the testimony of Matthew Rourke, who was standing on the southeast corner of Thirty-fourth Street and Second Avenue at this time. Gentlemen, one remark on the subject of position will suffice. I should take up your time not only beyond what is necessary, but beyond what would be justified under the cir-

cumstances, should I dwell at any great length upon the positions of various eye-witnesses to this occurrence. While they agree as to what transpired, they differ as to the positions of the combatants. They place them on the curb-stone, in the street, and in almost every possible position, from the north part of Murphy's liquor saloon down to the oyster saloon, or polling-place. Witnesses for the prosecution and defence alike differed in that respect. You may readily understand why any of these witnesses may have been mistaken as to whether O'Brien and Croker, at a given moment, were precisely in front of the telegraph pole, whether they were farther down in front of the awning, or whether they had got in front of the oyster saloon, or in what precise position they were. Their locality in respect to their being in front of one place or another was not important in the minds of the witnesses. They saw what their relative positions were as to each other; they could not be mistaken about that; nor as to whether they had pistols in their hands. But I am free to say that any of the witnesses may have been mistaken as to the identical spot or portion of any particular building in front of which the combatants were at any precise point of time. Now our witnesses, eye-witnesses of the occurrence, were in every possible position; some of them were farther north than the combatants, some farther south, some farther out in the street, some in front of them, some in rear of them. They were in every position which the location afforded, and from every point of view, from every angle of vision—whether a direct view, a diagonal view, or any view which permitted the parties to see the faces of the combatants; they all told you one thing, every witness we have introduced on the stand told you one thing—namely, that at the time the shot was fired—I say every witness who was there and had an opportunity of observing—they were looking at

the *hands* of Croker and O'Brien and saw as distinctly as you can see my hands now—that Croker had no pistol nor weapon of any kind in either hand. Then you will note this, that although some of the witnesses had a better view of Croker than O'Brien, because some looked directly in the face of Croker, when they would be compelled to take a rear view of O'Brien, as a general thing, all the witnesses stated that neither O'Brien nor Croker had a weapon of any kind in his hand. You remember the testimony of Carr. I will not repeat it. You also remember the testimony of David J. Daly, a very intelligent, clear-headed witness, who had been trained among the bankers of Wall Street, who from his boyhood had been in the offices of various bankers and brokers, who had held official positions in this city, had been a clerk or occupied an official position under O'Brien when he was Sheriff. This man—a strong, ardent admirer and friend of O'Brien—was present on that occasion. This witness was acquainted with the parties; he was on the most cordial, friendly terms with O'Brien, was one of the best friends Mr. O'Brien ever had, one who had followed his fortunes for years, through good report and evil report, under all circumstances, in prosperity and adversity. Daly is a man of great candor and frankness; he was as ready to acknowledge his own failings as his merits. He was right upon the spot, looking directly at Coroner Croker; and, while not unfriendly to Coroner Croker, was acting in opposition to him on this occasion, acting in the interest of O'Brien for Congress; and on this very day, so great was his friendship for James O'Brien that he offered to become bail for his brother when he got into the difficulty referred to in this case—he tells you that by no human possibility could the pistol have been in the hands of Croker without his seeing it; by no possibility could Croker have fired the fatal shot without his knowing it. He swears

that Croker did not shoot McKenna. The District Attorney cross-examined him, and he again affirmed that by no human possibility could Croker have done it. If Coroner Croker fired this shot, then not only Daly, but Biglin and a host of witnesses we have introduced, have committed wanton perjury from no motive whatever. They are disinterested so far as this case is concerned; and if they had any interest, if Biglin and Daly had any interest, it was on the other side. They agree in regard to the fact that Croker did not have a pistol, that he did not shoot, and I cannot tell you how many more witnesses unite in the same testimony; because I have not had time since the evidence closed even to collect their names, but a vast number of witnesses testify that at the identical moment the shot was fired, and for a little while afterwards, *O'Brien and Croker were actually clinched*. Several of the witnesses, who cannot be mistaken, in corroboration of that fact, tell you that Croker dealt O'Brien a second blow *after* the pistol was fired. Beyond all doubt Croker was engaged with O'Brien at the time. Daly tells you that O'Brien said to the police officer, 'Arrest that man'; and Croker said to the police officer, 'Arrest O'Brien'; each charged the other with assault. *Now had O'Brien at that moment supposed, or thought it possible, that Croker had fired the fatal shot, he would then and there have charged him with it; but he did nothing of the kind.*

"Then, again, you remember that nearly all the witnesses state that they distinctly and positively recollect that at this identical time Officer Smythe had arrived on the scene. Some say that before blows were exchanged he put his hand upon the parties, or upon one of them, with a view to part them. Others assert that when blows were exchanged, and before the shot was fired, he arrested them, or, at least, endeavored to separate them. Some, I believe—a very few—state that this

occurred just after the first shot was fired, but the great bulk of the evidence is that it occurred before. Officer Smythe tells you that he was at the polling-place, which was a few feet from the scene of this violence, at the time the first shot was fired; that he went instantly and arrested the parties. Other witnesses—both for the prosecution and defence—certainly for the defence—say that he was there and had one hand upon the shoulder of Coroner Croker and the other upon O'Brien at the time the first shot was fired. Most of the witnesses say that he was there *before* the first shot was fired. He tells you himself that he arrived there before the second shot was fired; that he immediately arrested Coroner Croker; and he tells you furthermore that he kept his hand upon him from that time until he lodged him safely in the station-house. Now here is the testimony of this police officer—certainly not in our confidence—a man who secured his position through the influence of O'Brien, whose interests are all the other way; and yet he comes here, no willing witness on the part of the defence, with all his interests in favor of O'Brien, his benefactor, and tells you that Coroner Croker had no pistol in his hand; that he arrested him instantly after the first shot was fired; that he searched the pockets of his overcoat on the way to the station-house; that there was no one near him as he took him to the station-house; that the Coroner was thoroughly searched when he reached the station-house, and while weapons were found upon two of the other persons, none were found upon him.

“Now if this testimony be true, Biglin and Smythe and the host of witnesses who stood directly in front of Coroner Croker, and in the immediate vicinity, and looked at his hands at the identical moment the fatal shot was fired, would have seen the pistol had it been fired by Croker; and, furthermore, they would have seen him fire it. It is absolutely impossible that Croker

could have fired the pistol without their seeing him do it.

“Gentlemen, I have hurriedly reviewed this case; I have gone over it more rapidly than I should had I thought there was any necessity for dwelling at greater length upon the details of the evidence. I shall not advert to the various discrepancies of different witnesses upon immaterial points. I charge nothing against witnesses on either side on account of such discrepancies. I have sought to direct your attention to the main features of the evidence. I have endeavored to present it before you fairly. You have given this case great care. The jury themselves, to their own satisfaction, have sifted the witnesses most thoroughly, from an honest and determined desire to get at the truth, and to decide in accordance with the evidence.

“I have established—or rather the evidence establishes—the following propositions:

“First. The defendant was in such a position he could not have shot Mr. McKenna.

“Secondly. He had no pistol.

“Thirdly. It is proved that another man shot the deceased.

“Fourthly. It is positively proved by numerous respectable eye-witnesses, who testify from their own personal observation, that the defendant did not shoot the deceased.

“Fifthly. If instead of these propositions being proved by the evidence, as they are, there were any reasonable, well-founded doubt in regard to any of them, or in regard to any proposition which it is necessary to establish on the part of this prosecution, it would be your duty to acquit.

“Or I might phrase the doctrine in regard to doubt better by saying, if there be any reasonable doubt arising upon the evidence, within the rules of law, whether the prosecution have proved that Mr. Croker shot the

deceased, it would be your bounden duty to acquit; for the law very properly holds in its kindness, in its humanity—aye, in its keen sense of justice—that it is much better that the guilty escape than that the innocent be convicted and suffer. Yet in this case I have demonstrated to you beyond all possible doubt—beyond all peradventure—that this man is as innocent of this offence as his Honor upon the Bench, as any one of you, as any one of my learned adversaries, or any of my associates or myself.

“I now, gentlemen, with entire confidence, thanking you for your kind attention, submit the case of my client to you. I have done my duty. Because Richard Croker performed his duty he has been immured within the four walls of a prison. For this, the honest discharge of duty, day after day, night after night, week after week—has his incarceration been prolonged. Soon you must perform your final duty in this memorable case. God grant that the time may never come when any of you, for the honest, fearless, faithful performance of duty, shall suffer martyrdom as has this defendant. At all times, in all emergencies, on all occasions, the only safe guide in all the varied relations, the ever-shifting scenes of life, is the God-given monitor within every man's bosom—conscience. This side the grave there is no luxury of enjoyment like that of conscience clear and a sense of duty performed. Better, far better, imprisonment within the walls of yonder dungeon than the doom of the man who on the witness-stand rolls perjury like a sweet morsel under his tongue.

“Because this defendant, when dangers thickened and ruffianly violence was let loose, performed *only* his duty, he has been torn from his family and cast into prison. Gentlemen, I envy you the happy moment so soon to arrive when your verdict will restore him to that young and loving wife who so recently gave birth to a son—

her first child—when the idol of her affections, the partner of her joys and sorrows, was kept from her by bolts and prison bars.

“Aye, gentlemen, you can never know the suffering, the agony, this young husband, in silence in his prison-cell, endured, when, in her critical condition, he feared her spirit was hovering between life and death, and he was thus debarred the dear privilege of ministering to her wants and watching over her with that tenderness and devotion inherent in his nature. Well might he exclaim :

“ ‘Give sorrow words; the grief that does not speak
Whispers the o’er-fraught heart, and bids it break.’

“His father, aged and blind, awaits the deliverance of this defendant. Whoever has watched this trial cannot fail to discern his innocence. Throughout the entire evidence the truth of this defence is :

“ ‘So well appalled,
So clear, so shining, and so evident
That it *must* glimmer through a blind man’s eye.’

“Gentlemen, only the defendant is wanting to complete the family group. The loving wife, the young mother, the infant son await the coming of Richard Croker. The lesson taught by your verdict will sink deep in the public mind. Let it be known and read of all men, let it be everywhere understood, that, come what may, a New York jury dare, and under all circumstances *will*, do their duty.”*

* District-Attorney Phelps made an able and powerful address to the jury, strongly urging the conviction of the defendant, after which Judge Barrett made an elaborate charge. The jury retired, and after being out twenty-four hours they were unable to agree, and were therefore discharged—a majority being for acquittal. Subsequently, the District Attorney, having become satisfied that Mr. Croker was entirely innocent, the further prosecution of the case was abandoned. On the motion of the District Attorney, the indictment was dismissed.

CHAPTER XXXIII

CASE OF FAVRE AGAINST MONVOISIN

Tried in the New York Common Pleas, in October, 1873.—Mr. Clinton's Address to the Jury on Behalf of the Plaintiff.—The Verdict.—An Extraordinary Case of *Crim. Con.*

THEODORE FAVRE brought an action in the New York Common Pleas against Maxime N. Monvoisin, charging him with the seduction of his wife, and demanding twenty thousand dollars damages. The trial came on in October, 1873. Mr. Clinton and John L. Hill acted as the Counsel for plaintiff, and A. S. Sullivan conducted the case for the defence. Upon the close of the evidence, Mr. Sullivan addressed the jury on the part of the defendant; after which Mr. Clinton, on the 21st of October, delivered the following address to the jury:

“GENTLEMEN OF THE JURY,—Three and thirty years ago, in their native France, the destinies of Theodore Favre and Victoria Paten were united by the most sacred of earthly ties. Although twelve years her senior, his nature was as frank, his heart as open, his devotion as generous, his affection as pure as though he had not seen more years than his child-wife. Young as she was—her age scarce fifteen years—when they started together on the journey of life, her devotion to him knew no bounds. His every wish was the law of her existence. To contribute to his happiness, to lighten his cares, to diminish his anxieties, to be in all things a faithful wife and devoted mother of his children—to achieve all this she strove with a zeal born of virtue, which bid fair to

last until both should descend together the dark valley of the shadow of death. In the purity of her devotion, the language of her heart to him was that put by the noblest of England's bards in the mouth of the first of her sex, addressed to her husband. Ever behold in me

“ ‘Thy likeness, thy fit help, thy other self,
Thy wish exactly to thy heart's desire.’

“Not only then, but as time rolled on, and the child-wife became the mother of children; when the New World opened its prospects upon them and an ocean no longer rolled between them; when an increasing family brought increased cares; when youth from her had forever departed; when from him middle age had vanished into the past, and he felt that the evening of life would soon be upon him; at all times, under all circumstances, whether prosperity lighted his pathway or adversity chill and dark befell him, he ever found his comfort, his solace, his consolation in the society and companionship of his wife, the queen of his household, the idol of his heart, the divinity of his affections. She, as he believed, was as pure as on the day their union was consecrated by the outward forms prescribed by Church and State. True, their lot was cast in the middle walks of life. Luxury and wealth they knew not. His great treasure, as he ever fondly believed, was in his wife. As he beheld her year after year struggling on with him, never weary in her efforts faithfully to discharge her duties to her household—her devotion to his interests, her affection for him increasing with advancing age—the thought ever uppermost with him was: ‘In the vicissitudes of life, whatever disaster may overtake me,

“ ‘She is mine own,
And I as rich, in having such a jewel,
As twenty seas, if all their sands were pearl,
The water nectar, and the rocks pure gold.’

“Gentlemen, I have faithfully sketched the domestic relations of my client from his wedding-day to the time this defendant became his copartner in business and a member of his household. In January, 1869, this defendant, who, up to that time, his Counsel tells you, had been a humble mechanic, was taken by the plaintiff into copartnership, and introduced to what was to him a lucrative business. The plaintiff elevated him to that position. The circumstances were peculiar. Counsel has told you that my client, in order to help along his fellow-countryman, not only took him into a lucrative business, but kindly gave him the use of a strip of land on which he permitted him to erect a dwelling suitable for himself and his family.

“Not long afterwards the defendant was overtaken with an affliction which you would have thought sufficient to soften the heart of any man. His wife fell a victim to intemperance, a vice which has desolated so many households, and to such depths did she fall that he caused her incarceration in one of the penal institutions of our State. He was left with a little child five years of age upon his hands. My client and his wife, in the kindness of their hearts, took charge of that little child. She mingled with their children and their children's children, and became one of their family. They shared a common table. Gentlemen, under such circumstances you would have supposed that the kindness which the defendant received at the hands of my client would be sufficient to chill — to freeze — any impure thoughts or designs which, under other circumstances, might have taken possession of his nature. Yet what was the result? At the head of this household was one who at the early age of fifteen was wedded to the plaintiff. She was a person remarkably youthful in appearance, and undoubtedly possessed of great attractions — certainly to her family. At a very early age her own

children were married, and her grandchildren were springing up about her. Yes, gentlemen, she who was wife at fifteen, mother at sixteen, grandmother at thirty-three, with her children and children's children, in about equal numbers, around her, and forming a most interesting family group; ten years only the senior of this defendant, his junior in appearance, she is the one whom, under such circumstances, he selects as the victim of his lechery. You would have thought, gentlemen, that the holy associations clustering around that household would serve as a wall of adamant between my client's wife and this defendant, so far as any impropriety was concerned. But not so! The Counsel has told you that my client's wife ministered to the wants of this little one—the daughter of the defendant; that she performed all those services which a mother only, in her tenderness, can perform for a child. The intimacy of the families necessarily threw the defendant, to a large extent, into the society of the plaintiff's family, including his wife. It was necessary for Mrs. Favre at night to go to the defendant's premises, which adjoined those of the plaintiff, to put that little one to bed, to hush her to sleep, and probably to hear her prayers; such were the occasions which the defendant seized to undermine her affection for her husband, in order that he might, in time, secure her as the victim of his lechery.

“When did this guilt begin? We know not. That good matron up to this time had been as pure and virtuous as any woman living, so far as we know and believe. You have seen the confidence my client reposed in his wife up to the time of the fearful disclosure of her guilt. He thought nothing of the intimacies which grew out of the family relations of himself and his partner. He did not object to the ministration to this little child, the only offspring of this defendant.

“Now, gentlemen, the defendant, from the time he

was taken into partnership with the plaintiff, must have cast his lecherous eyes upon this woman, because, as my able and eloquent associate told you in opening this case, a woman like Mrs. Favre, who has grown to the years she has attained, surrounded by her children and grandchildren, does not fall at once. It must have been by insidious and long-continued approaches that this defendant finally succeeded in capturing the affections and effecting the ruin of my client's wife. At first, undoubtedly, their intercourse was guarded and cautious. I have no doubt that every precaution was used. You must infer that from your knowledge of human nature. The Counsel asks you if the parties would have been as open and shameless as the testimony shows them to have been if the wife had been pure up to that time. But remember that it is human nature, after an intercourse of that kind has progressed for months, if not for years, and the parties have not been detected, that they should grow bold. You know that this is the course of these matters; that it is the course of vice of every kind. Take the clerk who has purloined from the till; take the public officer who has embezzled the public money. At first he is cautious and guarded; he watches the countenances of all around him, to see if suspicion is written upon them. The next time he perpetrates a similar offence, and is not detected, he is less cautious. And so on, until finally, from a long course of practice, he becomes more and more bold, until, from his lack of caution, from his reckless carelessness, from his overweening stupidity, he is discovered.

"I remember a case in this city some years ago, in which I was Counsel upon the one side, of a defalcation in one of our banks. The receiving-teller for a year and a half had been in the habit of embezzling the funds of the bank. He was very cautious; he would not leave town year after year. No sickness would prevent him

going to his place of business, because if his assistant once looked at the books and footed them up he would discover the defalcation. The error consisted not in wrongly putting down any man's account, but in forced footings. That error might have been discovered at any time. But finally, year after year, he became so bold—he was engaged in speculations in Wall Street, sometimes ahead, but oftener behind—that he thought he had been inured to the slavery of watching his crime long enough, and on one occasion he left earlier than usual, in order that he might not have that day a cold dinner. His assistant thought he would add up the figures. He did so, and instantly discovered a defalcation reaching somewhere from thirty to fifty thousand dollars. The whole matter at once came before the public. Now Counsel might as well have argued that that man would not, for the sake of getting a warm dinner, run the risk of destroying the future and bringing disgrace upon his family. But the answer there would have been the same as here—that one gets inured to vice and crime, and finally becomes so bold that detection follows. But for that fact detection often would not ensue. My friend has told you much about his experience. When he was the learned prosecutor of this county, he will bear me out in saying that in a great majority of cases where persons were convicted of crime it was after they had become so bold that it was through their own carelessness and stupidity that they were finally detected. And so it was here with reference to the defendant.

“The first time the evidence proves the existence of this illicit intercourse is no further back than June, 1871. That is proved by one of his daughters. I shall not trouble you with the sickening details. The daughter stated, under the solemnity of her oath, the circumstances under which she discovered her mother and the defendant on that occasion. She saw them near the

window. You remember the position in which she described them. This girl undoubtedly was shocked beyond expression; and as she said, in reference to that and another occasion—as the other daughter said, for fear of making trouble—they did not complain of their own mother. The daughters tell you that on that occasion the defendant slunk away; he crept away, and the mother readjusted her dress. Says the Counsel, Why did not the daughter go and tell that fact instantly? Why did not the mother beg that daughter not to disclose what she had seen? Unquestionably the mother and the defendant may have believed that the girl had not seen all that she did. They may have thought—the one by creeping away and the other by instantly adjusting her dress—that they had prevented the daughter discovering them in the act of adultery. From the silence of the daughter they may have inferred that she was not cognizant of all the facts to which she has testified. The same remark will apply to the subsequent occurrence to which she testifies. The Counsel wishes to have you believe that she is mistaken, and that her sister is also mistaken. Gentlemen, there can be no mistake. This little girl, who feels the obligations of an oath, who attends church—as the Counsel proved—who has honesty and integrity and the simplicity of childhood written upon her countenance, gave her evidence as truthfully and faithfully as ever testimony fell from human lips. You witnessed her manner and that of her sister. Now, gentlemen, can she be mistaken? Not at all. Either she and her sister, and four or five or six other witnesses, have committed wilful, deliberate perjury, or this defendant is guilty of that which is charged against him. Mistaken! What! under the circumstances she disclosed! I will not further allude to the first occasion. On the second occasion she described the position of her mother and Monvoisin. She

described them in the very act. Mistaken! What does the Counsel mean by saying that she is mistaken? You remember she states that upon discovering the parties they hurried away. She told the circumstances under which she discovered them. Could there be more clear, positive, and direct testimony given in any case?

"You have also the evidence of the married daughter, who saw the guilty couple on a different occasion. The Counsel has said that he does not believe in *knot-hole* testimony. That is not exactly the description of this evidence. There is no reason to suppose that that daughter (Mrs. Zendulka), when she stopped and at first saw her mother go into Monvoisin's apartments, drew from that circumstance any unfavorable inference. Her mother was in the habit of going there to attend to his child. When she saw her go in it was natural that she should wait for her to come out, so that she might join her and converse with her upon the usual domestic topics. That was the reason (or it was some similar one, as you have a right to infer) why she waited for her mother to come out, supposing that she would soon do so; but when she had waited a considerable time and saw that her mother remained—when, to her horror, she observed that Mr. Monvoisin actually undressed before her mother, got into bed, and blew out the light—I will not allude to a variety of other circumstances pointing in the same direction, as to the purpose for which the guilty ones were there—why, gentlemen, an impression was made which, while life lasts, can never be effaced from her memory. Mistaken about that! Why must this and the other daughter be the victims of the vituperation of the learned Counsel? Mrs. Zendulka, having been brought up, as she believed, by a virtuous and honest mother, having children herself to whom she had set a virtuous and honest example, what was she to do when she saw this conduct on the part of her own mother? Not knowing what

to do, she made no disclosure to the plaintiff until the period of time to which I shall presently advert.

“Think of such a spectacle, gentlemen! These children from their infancy taught to respect that mother, never for a moment suspecting her of evil, when they saw that she whom they regarded as the embodiment of womanly perfection, to whom they were bound by such ties of affection, was guilty of such deeds, their conduct was such as the Counsel says was commendable. On this point he cited Scriptural authority—they turned their backs, and they concealed the moral deformity of that mother. They did that which, the Counsel says, it was highly commendable in human nature to do. They did their utmost to conceal their mother's wickedness. I will not say whether it was their duty at once to tell their father. God forbid that any other daughters should ever be placed in such a dilemma, where in order to tell the truth to their father they must expose the hideous moral iniquities of their mother. But these daughters did just what the Counsel says they ought to have done. They did not expose their mother's conduct. They kept their mother's shame hidden. They from their earliest infancy had looked up to her with love and affection, and when the ideal of ‘mother’ which had been instilled into them, in which they had believed from their cradle to that hour, vanished in the darkness of crime and infamy—when, instead of a pure and virtuous mother they saw before them an adulteress, those wretched children knew not what to do. The gushing tenderness of their nature for the *mother* overcame them, and they did conceal her moral deformity until concealment was no longer possible.

“Now, gentlemen, this defendant is guilty or he is not guilty. The Counsel wishes you to believe that he is not guilty of illicit intercourse with Mrs. Favre because he comes upon the stand and swears that he is in-

nocent. The naked issue is presented to you. You must either believe this defendant has sworn falsely—I will not stop to discuss that ugly word ‘perjury’ at this moment; he has sworn to a deliberate falsehood, and the law calls that perjury—or else the two or three daughters of this plaintiff, and Mrs. Healey, and the plaintiff himself have all committed deliberate, wanton perjury. You must impute perjury either to this defendant or to five or six innocent witnesses. My learned friend and I view this matter differently. Since the statute was passed which in criminal cases permits the parties to testify in their own behalf (and it is a comparatively recent law), every criminal goes upon the stand and swears that he is innocent. There is not, as far as my observation extends, an exception of more than one in a hundred cases, if there be any exceptions. The case may be proven on the part of the prosecution as strongly as ever human testimony can establish any case, and yet the defendant will go upon the stand and swear that the evidence given against him is false, and that he is entirely innocent. What is to be done in a case like that? My learned friend himself filled the state-prison with convicts when he was public prosecutor by convincing juries that under precisely those circumstances they ought not to believe a defendant; and if they did not believe him, they morally convicted him of perjury. This precisely resembles such a case, and although my learned friend talked with an eloquence to-day which I was delighted to hear, yet I could only wish you might have heard him when he was presenting a view analogous to my side of the case; when he told juries that where a defendant, under like circumstances, came upon the stand and swore that he was innocent, that man had the appalling alternative presented to him of either going to prison or saving himself from infamy by committing perjury. If my learned opponent was eloquent

to-day, gentlemen, how much greater was his eloquence on occasions of the kind to which I have adverted.

[Mr. Clinton was here interrupted by one of the jurors, who drew the attention of the Court to the fact that a young girl, one of the defendant's witnesses, was sitting in the court-room. After she had left, Mr. Clinton proceeded as follows:]

"I thank the juror for the suggestion. Had I known that that young girl was in this room before I made those remarks, and sketched that scene of the discovery of a mother in the act of adultery by such young children, I myself would have made the request that she be asked to retire.

"In addition, what other testimony have you? The testimony of Mr. Favre. Now I ask you, gentlemen, whether Mr. Favre deserved the vituperation which was heaped upon him by the learned Counsel? He said things in regard to Mr. Favre from which I know the kindness of his own heart will recoil, and were those words now read to him I think he would repudiate them before you retire to your room to deliberate on this case. He told you that Mr. Favre had none of those fine sensibilities which would induce a jury to attempt the vindication of his wrongs. He painted him as a man utterly bereft of moral sensibility. Now you saw Mr. Favre upon the stand. You had an opportunity of seeing him examined and cross-examined, and if ever there was a witness who was candid, frank—who told his wrongs with the simplicity of truth itself—that witness was Mr. Favre, the plaintiff in this cause. Wherein has he done wrong? You heard his story in relation to the discovery of the guilt of his wife. Up to that moment suspicion had not crossed his mind. He had lived with that good woman thirty-one years. She had borne him eleven children. His grandchildren were growing up around him.

“On that occasion the defendant had absented himself during the evening. He and the defendant did not spend it together, as was their habit. About eleven or twelve o'clock Mr. Favre, who had spent the evening with his family, stated to his wife that the hour for retiring had arrived. She made an excuse to remain a little longer, to finish a dress upon which she was sewing. No suspicion arose from this circumstance. After he had undressed and gone to bed, he knocked on the floor to signify to her that it was time for her to come, or that there was something wanted. The child, their youngest, required her kind attention. He needed a glass of water to allay his thirst, and for that reason the father had knocked for the mother. He waited, anxious in regard to his child, unsuspecting of his wife. He knocked again and again, and finally his fears were aroused that some accident might have occurred. He hurried down-stairs, and went out in the yard. He saw that the defendant's apartments were closed; the light was out. Under these circumstances he observed his wife emerge from the defendant's room. He was excited, more so than he is now aware. His conduct was probably described more accurately by his daughters than by himself; for at this distance of time I do not believe he is conscious of the extent of excitement which then overcame him.

“Just think of that scene! This father, who had lived with his good wife so long, sees the moral evidence of her guilt, which falls like a thunderbolt upon him. His future is gone. He is an old man, over sixty years of age. He knows not what to do. His is the voice of nature. His is the voice of an honest man, who has toiled for forty or forty-five years at his business. His is the voice of a husband and a father, who has loved and honored his wife, and brought up his family in the principles of honesty and virtue, and then for the first

time sees in that wife, not the virtuous mother of so many children, but an adulteress. Suddenly he says, 'What! I have found you out. I will not live under the same roof where you are. You must go. I will not touch contamination nor defilement. I cannot.' He has not time to stop and think how the poor woman will gain her support or what will become of her after she has gone. He says, 'Go! I will not remain under the same roof with you!' During that night, as the daughter tells you, he paces his room; he descends to the floor below; he returns; he wanders up and down. The dreadful load is upon him. He is overborne with shame. Disgraced and humiliated in his own household, he cannot bear to think of the morrow, and the day after, when he must look his fellow-men in the face. The wretched, fallen woman rushes down-stairs. I have no doubt she was horror-stricken at the discovery of her guilt. Her daughters, who had so often nestled in her arms, whom she had brought up so tenderly, seeing this dreadful blow fall upon her, hide her away and shelter her; they put her in another room so that their father will not know but that she in the darkness of night has fled, a homeless wanderer upon the face of the earth. They even practise a little deception towards their father, and do not inform him that she is there. The miserable woman sits up all that long, dreadful night. O God! What a night was that to this unhappy family; the father up-stairs under the circumstances I have described; the mother down-stairs with her wretched children around her, those children knowing her guilt—one of them, if not both, having discovered her in the very act. And yet the kindness of their nature overpowers them. They see, instead of the adulteress, the *mother*. They cling to her.

"Where is this defendant? He knows all; he sees all; he hears this outcry, this charge; he sees the mis-

ery he has brought upon this family. The eldest daughter, in the agony of her heart, cries out to him, 'Monvoisin, if this is not true, why don't you rush to the defence of my mother? If it is not true, why don't you come and aid her? Why don't you deny it? Why do you see her charged with these infamous, wicked acts, and yet not spring to her help?' But no; this man remains in his house and locks the door. Well might he fear the violence of Mr. Favre. It was well that he did lock his door, for he had every reason to believe that if Mr. Favre in his rage should seize him, he would send him to his grave unprepared for that eternity upon which we must all so soon enter. This defendant had reason to lock his door. Very fortunately the next day was Sunday—and what a Sunday for that family! Mrs. Favre, this wretched woman, early that morning, before daybreak, goes a wanderer from the home in which she had lived, and which she—as her husband had hitherto believed—adorned for so many years; she goes she knows not whither.

"The defendant that morning, knowing that Mrs. Favre is driven away, meets her daughter. I think the occasion to which I allude was as late as ten or eleven o'clock. That daughter, in her distress and agony, says—what? 'Oh! what will my poor mother do? Father has expelled her from the house; she has no means of livelihood. If we, her children, can save from our earnings enough to take care of her, to save her from infamy, we will do it. What will my poor mother do?'

"What does Monvoisin say? 'She is in this difficulty on *my* account. I will furnish money.' Why, gentlemen, was not that conscious guilt, that could thus address these daughters who were mourning the loss of their mother? It was a loss worse than death, for their hearts would not have so bled had they, in the course of nature, followed that mother to an honored grave.

When they, in their very agony, are thus crying out, this defendant, knowing his guilt, says: 'This is *my* affair. I will see to it.'

"What next? Mrs. Favre goes to this woman, Mrs. Bonneau. The next day Mrs. Bonneau returns to New York. Mrs. Favre, like every other adulteress, denied her guilt. She told Mrs. Bonneau that she was innocent. Did you ever know an instance of a woman for the first time caught in the act of adultery who to her friends and acquaintances did not deny the fact? That disposition to deny such a fact is implanted in the very nature of every woman. To the very last she will deny that she is guilty of even an impure thought. That is true of the worst of women, and how much more true must it be of one who had never fallen, except in her intercourse with a single individual? Many years ago, in this city, it was my fortune, together with the late David Graham, to be associated with the prosecution in a very remarkable case on the criminal side of the Court. The complainant was a woman, who accused her clergyman of impropriety. She charged him with an attempt at rape. The circumstances as related to us were extraordinary. We had no reason to doubt the story of this woman; we had no reason to doubt that her character was pure, that she was free from any criminality, and had been so during her whole life. She had a husband, whom we believed to be a very reputable man, who was engaged in a most respectable business. We told her that if, during her whole life, she had ever committed any offence of the kind to which I advert; if there had ever been any scandal in connection with her; if her relations with the opposite sex, under any circumstances, in the days of her youth, or at any time, had been otherwise than in accordance with strict propriety, no matter though the defendant—the clergyman—were guilty, she ought by no means to press that case. She ought to

avoid the scandal. We told her that as sure as there was a God in heaven the publicity of the trial would bring out her antecedents from any part of the country if she had been guilty of anything of the kind. She assured us that from her cradle to that hour she had been as pure as the driven snow, that the breath of scandal had never reached her. We went to trial, and the result was that the publicity of the proceedings brought to light the fact that she had been an abandoned woman from her early years, that she had committed bigamy several times, and that at the very time we were sympathizing with her excellent, worthy, honest, high-minded husband, he was no husband at all, but she was living in open adultery with him; he had another wife, and they were both liable to indictment for bigamy. I mention this case to show how strongly the disposition is implanted in a woman's breast to deny her guilt. Mrs. Favre denied her guilt. That was natural.

"Mrs. Bonneau on Monday came to the city and obtruded herself into the plaintiff's family. The plaintiff had known her as a countrywoman. There had not been much intercourse with her and his family. One of the daughters says they had visited her two or three times in the last ten or twelve years. You saw her as she appeared upon the stand. When she went to that house on that occasion she was an intruder. That was a house of mourning and desolation. She went there and took the part of Mrs. Favre. I will not blame her, for Mrs. Favre had told her that she was innocent. Mrs. Bonneau tells you that this little girl—the plaintiff's daughter—said they were trying to induce her to tell that which was not true. Now, gentlemen, nothing whatever of that kind occurred, and I attribute the assertion to the imagination of Mrs. Bonneau. I do not say that she told an intentional falsehood, but I do say that that statement is not true. It may be, at this dis-

tance of time, that she has got her numerous conversations with this defendant mixed up with her recollection of that interview on Monday at the house of Mr. Favre. It is a significant fact in this connection that Mrs. Bonneau's home, at this day, is the home of the defendant and his child.

"On Wednesday these parties, Mrs. Favre and the defendant, got together. Where? At Mrs. Bourke's. Mrs. Favre goes to Mrs. Bourke's, and Mr. Monvoisin conveniently happens to be there. The Counsel told you that Mr. and Mrs. Bourke would be called to explain that fact, but they have not made their appearance. Up to this time the defendant had never gone to Mrs. Bonneau's to remain all night. He knew that Mrs. Favre was there, and he went there Wednesday evening, and saw her. The other side wish you to believe that in this he was actuated by proper motives. He made arrangements for that to be his home; and he took his daughter up and left her where Mrs. Favre was. He went up there as often as he could; for several weeks he went every few days.

"The next we hear of their proceedings is that arrangements are made that they shall throw off all disguise. After Mrs. Favre had left her home under the circumstances detailed to you, the arrangement was made with defendant that they should go to East Thirty-sixth Street, and live in open adultery. This is proved, gentlemen of the jury, not by the plaintiff and his family. Why, if you were to strike from the case the evidence of every member of this family and his own evidence, the proof of this adultery would be clear and overwhelming. The defendant went there; he admits that he went there. What does he do? There is no other way by which he can engage in lecherous indulgence with this woman. The only way by which he can gratify his brutish and hellish lust is to secure her depend-

ence upon him in his own apartments. He, therefore, according to the testimony of Mrs. Healey (a disinterested witness and an entire stranger to us—she did not know Mr. Favre at the time), who had rooms to let, went to her, and did what? He engaged rooms for his family, consisting of three. He then took his furniture from his own house, near the plaintiff, and moved it to this place in East Thirty-sixth Street. He had his own house, and could live there rent free. He could have his little daughter there, and could have any woman whom he might engage as house-keeper, under suitable circumstances, to take care of her. But no; that poor man gives up his own house, takes his furniture, goes to East Thirty-sixth Street, and there engages rooms for his family, consisting of whom? Consisting of himself, as he told Mrs. Healey, his *second* wife, and his little girl. It is true he swore that Mrs. Favre slept not in the room with him, but in the other room, on the lounge. Yet from the circumstances it is clear that they lived together in open and notorious adultery. Mrs. Healey, who saw them there frequently, considered them man and wife, and knew nothing to the contrary. I asked him if he agreed to give Mrs. Favre any money for her services? Not at all. He supported and took care of her. What excuse did he give for not living in his own place in Tenth Avenue? He said he was afraid Mr. Favre would kill him, because Mr. Favre had charged him with improper conduct with Mrs. Favre. If that were true, if that were the reason, would he go to this place in East Thirty-sixth Street, introduce Mrs. Favre as his second wife, and let her pass by his name (for there is nothing to show the contrary), she purchasing whatever was necessary for their joint use, and he paying for everything, she performing all the duties of a wife, taking care of his child and the rooms, and he supporting her? There is but one construction, of course,

to be put upon such conduct. Mr. Monvoisin admitted this himself. The nature of their intimacy is proved by Monvoisin, Mrs. Healey, and by the man who kept the store at which she made the purchases. I would like to know how we could prove that any man was living with a woman in open adultery, except in this way. There is no other mode of proving it. They had no servants. Had they employed a servant there, we could have called her to prove that they occupied the same bed. There was no person to call except Mrs. Favre, and the law adjudges her to be an incompetent witness in this case. The only other witness whom we could have called is that little girl, seven years of age, too young to understand the nature of an oath ; but for other reasons, which will readily suggest themselves to you, we would not call her. No witness can speak, therefore, as to what transpired in that bedroom except Monvoisin himself. And he admitted enough to prove clearly and satisfactorily that he was living there in open adultery with the plaintiff's wife. He told you that she tried to get work elsewhere. Where is the proof? To whom did she apply? Where is the witness who will substantiate that statement? Had she applied to any person in New York for work would not that person have been forthcoming to prove the fact?

"When the defendant said he did not live in Tenth Avenue because he feared the violence of the plaintiff, he testified, I believe, to what was false ; because had he feared that the plaintiff would take his life on account of the wrong he had done him, he must have known that the plaintiff would have been far more apt to wreak his vengeance upon him when he saw that his wife lived in open adultery with her seducer. How long did that continue? Up to the 15th of November. You remember the declaration brought out on cross-examination by my learned friend on the other side when one of the

plaintiff's daughters testified as to the conversation with her father. The Counsel asked if she did not hear her father say that he was going to bring suit. The answer was that she did at the time her mother and the defendant were living together in East Thirty-sixth Street; and the father, in speaking of that fact to his own children, said: 'What a shame! They are living in open adultery! I will have Monvoisin arrested. I will bring suit.'

"Gentlemen, the father delayed week after week, disinclined to bring this subject before the public, unwilling to lay bare his own shame. This kind-hearted Christian man knew not what to do. Had Monvoisin, on the night of the 7th of October, 1871, been in his presence—had the door not been locked—had they been together in the yard of the plaintiff's house when he made the first discovery of his wife's guilt—his reason might have been dethroned and his passion so aroused that he might have imbrued his hands in the blood of his fellow-man. He might have had the guilt of murder resting upon his soul. But, fortunately, Sunday, with its hallowed associations, intervened, and there was time for the broken-hearted father to think and reflect. The result is that, thanks to God! he has not imbrued his hands in the blood of this man. Had he done so, however great the provocation, I believe it would have been wrong, because the laws must be enforced. Had he rushed to the defendant, broken open his door, dragged him into the yard, and there thrust a dagger into his heart and sent him to another world, and had he then been put upon his trial, the jury would have undoubtedly said he was justified. They would have acquitted him. This is the usual course of juries in such cases. Their sympathies get the mastery over their judgment.

"The plaintiff could not bear the sight of that woman. So far as I am aware, from that hour to this not a word

has ever been exchanged between them. He could not endure the sound of her voice; and yet, gentlemen, on the other hand, he had this to consider: she was the mother of his children; she was the mother of children who themselves had children. Her name had been untarnished up to the time of her guilt with defendant. Undoubtedly he could not bear that she should go forth to the world either as the mistress of this wretch or that she should become the tenant of some brothel, where she would die in shame and ignominy. Such considerations restrained him. He waited week after week. He heard that his wife was at Tuckahoe with Mrs. Bonneau. He heard that Monvoisin had followed her there. He banished Monvoisin from his presence. He broke up the partnership. They were pursuing a lucrative business. The partnership had been agreeable as well as profitable. The Counsel told you that my client was engaged in a conspiracy to drive Monvoisin out of the partnership and rob him of the fortune invested in the business; and yet but a little while ago the same Counsel told you that this poor man had nothing whatever; that he was without means, and therefore you should not find a large verdict against him. Mr. Favre heard of his wife being at Tuckahoe. As I said, he heard Monvoisin was also at Tuckahoe. That was a terrible blow to him. He thought that when she rushed from the city and went to a humble acquaintance who kept a boarding-house in the country; that when she escaped from the very island on which we live, she ought to be free from the contamination of this man. But no; he follows her there. Week after week rolls round, and Monvoisin, who had never before spent a night at Tuckahoe, makes arrangements with Mrs. Bonneau that her place shall be the home of himself and his family. Yet, after a while, when Mrs. Bonneau is tired of keeping this woman—or rather, gentlemen, when it becomes inconvenient for this

man to visit her at Tuckahoe as often as he would like—he begins to think that he must have her in New York; that she is too far from him. He can only visit her at Tuckahoe once or twice a week.

“When the plaintiff’s daughter went to see if her mother was there, and found not only her mother, but Monvoisin, he said to her, ‘What is your father going to do about it?’ He did not say, ‘I am innocent.’ He never once said he was innocent. When these children of Favre’s talked with him, or rather he with them, on the subject, why was it that he never once told them that he was innocent of the charge? He waits until his lawyer can say it for him. He does not say it. The father heard that his wife and the defendant were at Tuckahoe together. The daughter came back and reported the fact. Judge of that father’s condition of mind at that time when he heard that this man was still pursuing his wife. But worse was in store. The father took no legal proceedings; he did not then invoke the law.

“What next? The next he hears is that they are living together in open and shameless adultery at 328 East Thirty-sixth Street. The father hears of it, and says, ‘This is too much. I cannot stand it, I won’t stand it. I will commence suit. I will have him arrested.’ There they remained, in open and flagrant adultery, up to the 15th of November. When this father was driven to madness by his wrongs, and there was no other way by which they could be redressed than by this suit, he commenced it. He had no other remedy. Our laws are defective in that respect. In many States of this Union the crime of which this defendant is proven guilty is punished by a long term of imprisonment; but at the present day in this State there is no criminal punishment, and the only punishment is that which we ask you to administer. What was the plaintiff to do? He

had but one of two courses open to him, either to go to 328 East Thirty-sixth Street armed with a pistol or a dagger and kill the adulterer in the very act, or to resort to the law for redress.

“Christian man as he was, he resorted to the law. He made his complaint, and this man was arrested and taken from the very arms of the adulteress to jail. The only way under heaven by which he could be prevented from continuing his adultery with this woman was to have him arrested and locked up in Ludlow Street Jail. There he remained for four months. So determined was this man not to release his grasp upon plaintiff's wife that his intercourse with her could not be stopped unless the walls of a prison separated them. What followed? Then for the first time the defendant found that this adulterous intercourse was too troublesome. He found before this that his partner had expelled him from his business; that the partnership was broken and ended forever. That did not stop him, because he could get into other business. But when he found that he was incarcerated in jail, and that intercourse between himself and the partner of his iniquity was no longer practicable, he began to reflect. He wrote to Mrs. Favre, and she visited him in jail. What had he to do with her in jail? During these four months he had time to reflect, and, thank God, Mrs. Favre also had time to reflect. Her children had time to reflect, and they rushed to her rescue. They showed her the charity which children should show on such an occasion. They clung to that mother; they furnished her support, and their influence was so great with her that she finally broke off all connection with this wretch. She went back to her children, and they have housed and sheltered her from that day to this. It is true the younger daughters received money from their father, and the others from their husbands; they took from their hus-

bands' earnings and their own earnings what they could spare, and they all supported that mother in her distress. Notwithstanding the father's sense of his great wrongs, he has not the heart to forbid his children doing this, because but for their help her only resource would be to go down to the grave from some brothel, or to die an ignominious death in the almshouse. I have no doubt that, with the exception of her criminality with this defendant, she has always been a pure woman. Because the plaintiff did not exhibit greater harshness towards his wife he has been the victim of the Counsel's vituperation. He said that because the plaintiff did not forbid his children sheltering their mother, under the circumstances, his conduct proved that he regarded her a fit companion for his little daughter. No, she is not a fit companion, and yet she is her mother. The children have no choice as to who shall sustain to them the relation of mother. The ties of nature are strong, and in the kindness of their hearts they believe that their mother has repented of her crime in sackcloth and ashes, and therefore they are willing to furnish her shelter and support. Instead of this being a circumstance against them, it is a strong circumstance in their favor.

"Gentlemen, we have proved, first, that this defendant is guilty beyond all question.

"We have proved, secondly, that the atrocity of his conduct is so great that a jury should punish him to the utmost extent of their power.

"I ask you by your verdict to mark your sense of the atrocity of his conduct. The Counsel, for the purpose of inducing you to render a small verdict, has represented that his client is poor. Whether he is poor or not you have no evidence whatever. The Counsel has represented to you that you should not mete out the same punishment you would if these parties were in a higher

sphere of life. I cannot subscribe to that doctrine. Men of wealth, men in the higher positions in society, have other means of enjoyment. They can go to their clubs. They can go to their literary associations, to their lectures, to their amusements; they have many and varied associations by which, in the event of a domestic calamity, they may, to a certain extent, drive it from their minds; but with persons in the middle walks of life their homes are their all. This plaintiff has little of comfort left. What is his future? To what can he look forward? The Counsel says he had brought no action for a divorce. You see he is an old man. He has his children and grandchildren growing up about him, and under no circumstances would he ever marry again and bring another woman into his household as a mother to those children. The only object of a divorce would be to permit him to marry again. This poor man looks forward to no second marriage, and for that reason he has no object in suing for a divorce. He has not done it. He wishes his former wife to live, for the rest of her days, a life which will, as far as possible, show that she desires to atone for the wrongs she has committed.

"Now, gentlemen, I ask you to render a verdict for the highest amount mentioned in our complaint, for the purpose of setting an example, for the purpose of showing that, if there be no other law than that we invoke, if there be no other mode of redress in a flagrant case, a jury will mete out punishment to the utmost extent of their power.

"Gentlemen, you cannot but feel respect and compassion for my unfortunate client. Unless you would intensify the agony which pierced his soul, which caused his intellect to totter to its very foundation—which wellnigh laid his mind in ruins—when, with the blinding power of the lightning's flash, the truth burst upon him, and he beheld his family altar in ruins—his wife polluted,

defiled—himself the husband of one who had played the harlot—his children and his children's children compelled to gaze on one whom they had loved and revered as the honored head of their household—aye! compelled to behold in her a shameless, hideous adulteress; unless you would add to the desolation of such a scene, you will render a verdict which will brand this seducer, this adulterer, as a moral leper, whose presence in the family circle is to be shunned as worse than pestilence and death.

“Aye, gentlemen, the scenes—the midnight scenes—of the 7th of October, 1871! Would to God that they might fade from my client's memory! that they would cease to overload his breaking heart! that they would no longer continue a dark cloud enshrouding his future with the blackness of despair! Gentlemen, not you, nor any upon whom a similar calamity never descended, can appreciate the depth of my client's feelings when first overwhelmed—crushed—with the knowledge of his own dishonor, his wife's infamy—the humiliation, the degradation in store for his children and his children's children. Ah, gentlemen, because you are human, because your hearts pulsate in unison with right, because you are the willing instruments of the law to do justice, because you know and feel the fond and endearing associations which cluster around the human heart and entwine themselves in our very existence at the mention of the sacred names daughter, wife, mother—you cannot, will not, render an unrighteous verdict which will suffer the defendant—this lecherous brute—to go forth from this court-room unwhipped of justice—unscathed by an offended and outraged law.

“Oh no! You will not deprive my client of the consolation which may yet give him heart—buoy him up with courage—to struggle and toil on for the support of loved ones dependent upon him during the brief rem-

nant of his days—the consolation of knowing that a jury of his peers have done all in their power to redress his wrongs and protect the family circle from impurity, defilement, and infamy.”

After a brief charge by the Court the jury retired, and in about ten minutes returned and rendered a verdict in favor of the plaintiff for ten thousand dollars.

CHAPTER XXXIV

CASE OF WILLIAM F. G. SHANKS

City Editor of the New York *Tribune*.—Arrested by Order of Kings County Oyer and Terminer, Charged with Contempt of Court for Refusing to Answer a Question put to him by the Grand Jury of Kings County.—Brought before Judge Fancher in New York City on *Habeas Corpus* and his Discharge Demanded.—Decision of Judge Fancher.—Decision of Supreme Court, General Term, First District, on Appeal.

ON the 22d day of October, 1873, William F. G. Shanks, City Editor of the New York *Tribune*, in obedience to a subpoena served upon him, attended as a witness before the Grand Jury of Kings County, State of New York. The *Tribune* had assailed some of the officials in Brooklyn on charges of malfeasance and corruption. While Mr. Shanks was ready to impart any information in his possession, and to give the names of witnesses who could prove the truth of the facts charged in the *Tribune*, it was well known that his sense of duty and chivalrous devotion to the interests of his employers would prevent his disclosing the names of persons who had given confidential information to the editors of the *Tribune*, or who had written articles which that paper had published. On that day he was brought before the Court of Oyer and Terminer of Kings County on complaint of the Grand Jury that he would not answer a certain question. The questions put to him in open Court and the answers given by him were as follows :

Question. “Do you know who wrote the article entitled

'The Brooklyn Ring's Method,' in the issue of August 30, 1873?"

Answer. "I do know."

Q. "Who was it?"

A. "I decline to answer the question, because I am instructed, as one of the editors of the paper, not to give the names of writers of articles published in it. It is one of the office regulations, and on the principle that the paper, and not the editor, is responsible."

Mr. Shanks was at once committed to jail for contempt of Court. He was thrust into a cell, and for one night made to breathe the prison atmosphere at the peril of his health, he having just arisen from a sick-bed after a confinement from lung fever to obey the subpoena of the Grand Jury. On the following morning (October 23) he was taken to New York on a writ of *habeas corpus ad testificandum*, to testify in the case of Stokes, then on trial in the New York Oyer and Terminer for the murder of James Fisk. Mr. Clinton and C. A. Runkle were retained to act as Counsel for Mr. Shanks, and on a petition sworn to by Mr. Runkle they applied to Judge Fancher, of the Supreme Court, for a *habeas corpus*, which was granted, requiring the production of Mr. Shanks before him at the Supreme Court Chambers at two o'clock in the afternoon of that day. The writ was served upon Mr. Stilwell, a deputy of Sheriff Williams, of Kings County, who had Mr. Shanks in custody. At the appointed time Mr. Stilwell appeared before Judge Fancher with Mr. Shanks. George W. Lyon appeared for the District Attorney of Kings County, and orally made return to the *habeas corpus* for the Sheriff of Kings County, that he held Mr. Shanks under and by virtue of a commitment of the Kings County Court of Oyer and Terminer, and a writ of *habeas corpus ad testificandum* and the orders indorsed thereon. According to the return, the commitment of the Kings County Oyer

and Terminer, so far as it related to the punishment, was in the following words:

"The Court doth adjudge the said W. F. G. Shanks, by reason of the premises aforesaid, guilty of a criminal contempt of Court, and doth further order and adjudge that the said W. F. G. Shanks, for the criminal contempt aforesaid, whereof he is convicted, be imprisoned in the common jail of the county for the term until he may answer the question propounded to him, which he has refused to answer."

Mr. Lyon offered to reduce such oral return to writing, but the Counsel for the relator (Shanks) waived such written return until the next day, to which time the matter was adjourned. In the meantime, Mr. Shanks was committed to the custody of his Counsel. On the next day, at the time to which the hearing had been adjourned, the District Attorney of Kings County (Winchester Britton) appeared before Judge Fancher and presented a written return of the Sheriff, and asked leave to substitute the same, with Exhibit B in place of Exhibit A, for the oral return made on the previous day. Such leave was granted, and such return being substituted, Mr. Runkle traversed the return under oath. Exhibit B, which Mr. Britton produced as forming a part of the return of the Sheriff, limited the imprisonment to thirty days. The effect of substituting commitment B for commitment A would be to deprive Mr. Shanks of the principal point of law on which Mr. Clinton relied to obtain his discharge. Mr. Shanks's liberty depended upon whether he was held under commitment A or under commitment B. The former consigned him to indefinite or perpetual imprisonment, and was therefore illegal. The latter limited his imprisonment to thirty days, which was the limit fixed by law. The point as to the illegality of the former commitment was distinctly raised by Mr. Clinton when the first return

was made by the Sheriff. In the report of the proceedings before Judge Fancher on the first day, which appeared in the New York *Herald* of the 24th of October, 1873, a verbatim copy of commitment A appeared, after which the report proceeded as follows :

“Judge Fancher asked to have the last of the order of commitment read over again.

“‘It makes the imprisonment perpetual,’ observed Mr. Clinton, after the reading. ‘I see it does,’ answered Judge Fancher. ‘And the law prescribes in such cases,’ continued Mr. Clinton, ‘that the extent of the punishment shall be either a fine of two hundred and fifty dollars or imprisonment for thirty days. It will be seen, therefore, that the commitment is void on its face.’”

On the hearing before Judge Fancher considerable testimony was given in order to determine upon which commitment Mr. Shanks was held. It appeared by the testimony of Sheriff Williams that he never authorized Mr. Britton to produce Exhibit B as a part of his return ; that he signed the return, intending to have the commitment marked “A” produced before Judge Fancher, and that he (Sheriff Williams) never knew or heard of any other commitment until the *habeas corpus* proceedings before Judge Fancher commenced. Judge Fancher, in his opinion announcing his decision, said :

“The proof shows conclusively that the subsequent paper [Exhibit B, which limited the imprisonment to thirty days] was not delivered to the Sheriff until after the hearing on the *habeas corpus* case had commenced.”

Upon the close of the hearing Mr. Clinton asked for the discharge of Mr. Shanks on the ground that he was held under commitment A, which was illegal and void, for the reason that the imprisonment was not limited to thirty days, but was indefinite and perpetual. After

argument, Judge Fancher so held, and discharged Mr. Shanks. (See Shanks's Case, 15 Abbott, N. S., 38.)

Afterwards the case was brought before the General Term of the Supreme Court (First District) on a *certiorari*, allowed at the instance of Winchester Britton, District Attorney of Kings County. The case was submitted to the Court on printed arguments by Mr. Britton, on behalf of the relator, and by Mr. Clinton, on behalf of the respondent (Judge Fancher). The Court reversed the decision of Judge Fancher. (See *People ex rel. Phelps v. Fancher*, 2 Hun, 226.)

Judge Westbrook, in delivering the opinion of the Court, says :

“When the writ of *habeas corpus* was issued to inquire into the cause of his detention, the Court of Oyer and Terminer of the County of Kings was in session, and that being the case, Judge Fancher had no power to make the writ returnable before himself, and no power to discharge the arrest. The order of discharge was absolutely *coram non judice*, and void. The statute reads :

“‘After the Court of Oyer and Terminer shall commence its sittings in any county, no prisoner detained in the common jail of any such county upon *any criminal* charge shall be removed therefrom by any writ of *habeas corpus*, unless such writ shall have been issued by such Court of Oyer and Terminer, or shall be made returnable before it.’ (2 Edmonds, page 784, section 27; volume 3 of fifth edition, page 1066, section 27.)

“The writ, in the form it was issued, was powerless to remove the prisoner. It was expressly forbidden by statute, and the Sheriff would have been fully justified in refusing to produce the body of Mr. Shanks, and in making a return that he declined to obey it, for the reason that the written law forbade it. That portion of our statute which contains the section we have quoted is entitled, ‘of the inspection of county prisons and the discharge and delivery

of prisoners confined therein,' and it is obvious from its title as well as its provisions that the Sheriff should not have brought Mr. Shanks before the Judge who issued the writ. The effect of his obedience was to remove the prisoner from the common jail of the county, contrary to the express command of the statute."

On its face the statute (3 R. S., fifth edition, page 1066, section 27) above cited had no application to the case of Shanks. First, he was not committed upon a criminal charge; secondly, he was not at the time the writ was issued, nor at the time it was served, "detained in the common jail" of the County of Kings or the County of New York. The petition on which the writ of *habeas corpus* was issued expressly alleged that Shanks was "then confined and restrained of his liberty by the Sheriff of Kings County in the Court-house of the City and County of New York."

Judge Fancher, in his opinion in the case (15 Abbott, 41), correctly says:

"If it be conceded that the imprisonment was constructively in Kings County, it has been held both at Special and General Term of the Supreme Court that the section referred to does not apply to a Justice of the Supreme Court; and that a Justice of that Court can, even when sitting at Chambers, issue a writ of *habeas corpus* that shall run to any part of the State, although there is an officer in the county where the imprisonment exists who could issue the writ. (People *ex rel.* Bentley *v.* Hanna, 3 How. Pr. Rep., 39; People *ex rel.* Trainor *v.* Cooper, 8 *id.*, 288; People *v.* Folmsbee, 60 Barb., 480-487.)"

Judge Westbrook, in his opinion, further says:

"The Judge before whom Mr. Shanks was brought by the writ, as the cases referred to expressly hold, had no power to inquire into the truth of the facts stated in the

commitment, nor whether the question was a proper one, nor whether the prisoner was privileged from answering it. 'The Legislature' (as Judge Bronson further says in 5 Hill, 168) 'did not intend to provide for a retrial by *habeas corpus* in such a case. The review is by *certiorari* or writ of error.' And this opinion of Judge Bronson is precisely in conformity with the statutes of our State (2 Edmonds, page 589, section 42 ; volume 3 of fifth edition, R. S., page 888, section 57), which declare :

" 'But no Court or officer, on the return of any *habeas corpus* or *certiorari* issued under this article, shall have power to inquire into the legality or justice of any process, judgment, decree, or execution specified in the preceding twenty-second section ; nor into the justice or propriety of any commitment for a contempt made by any Court, officer, or body, according to law, and charged in such commitment as hereinbefore provided.'

"These provisions of the statute seem to us to be very plain. In the first place, the officer allowing the writ is commanded 'forthwith to remand such party, if it shall appear that he is detained in custody * * * for any contempt specially and plainly charged in the commitment by some Court, officer, or body having authority to commit for the contempt so charged'; and in the next, such officer is declared to be *without power* 'to inquire * * * into the justice or propriety of any commitment for a contempt made by any Court, officer, or body, according to law, and charged in such commitment.' That commitment which, in the expressed duration of its term, is in excess of the power conferred, is neither *just* nor *proper*; and a review of that question necessarily involves its 'justice' and 'propriety.' We do not see how this conclusion can be avoided, for, if it be held that an officer who may issue a *habeas corpus* may discharge a person who is committed for a contempt because such party is committed for a longer period than the law authorizes, then such officer must necessarily pass judgment upon the 'justice' and 'propriety' of such commitment ; and precisely this the statute has forbidden."

The statutory provision above cited by Judge Westbrook by its express terms applies only to a commitment which is "*according to law*." It could have no application to Shanks's case, for the reason that the commitment, in its most essential feature—namely, the punishment inflicted—was in direct *violation of law*. It is a strange doctrine of Judge Westbrook's that if the commitment be for a longer period than the law permits, the party in prison cannot be discharged on account of the *illegality* of the punishment prescribed, because the discharge on that ground would imply that the imprisonment was *unjust and improper*. According to this doctrine, if the commitment had directed the imprisonment of Shanks for twenty years he would be without remedy by *habeas corpus*. If the Court of Oyer and Terminer could with impunity disregard the express requirement of the statute in respect to the *duration* of imprisonment, it could with equal impunity violate the statute in respect to the *place* of incarceration. According to the doctrine of Judge Westbrook, if the Court in its commitment had directed the imprisonment of Shanks in the state-prison for life, he could not have been discharged upon *habeas corpus*. *Was ever so much stupendous absurdity crowded into so small a space as in the foregoing extract from Judge Westbrook's opinion?*

In the case of *People ex rel., etc., v. Liscomb*, 60 N. Y. Rep., 559, the Court of Appeals held:

That the prohibition contained in said act (2 R. S., 568, section 42) forbidding an inquiry upon return to the writ into "the legality and justice of any process, judgment, decree, or execution" specified in the provision above referred to does not take from the Court or officer having jurisdiction of the writ the power, or relieve from the duty of determining whether the judgment or process emanated from a Court of competent

jurisdiction, and whether the Court had the power to give the judgment or issue the process.

That the words "legality and justice" as used were not intended to include questions of jurisdiction or power.

That if the record shows that the judgment is not merely erroneous, but is such as could not, under any circumstances, or upon any state of facts, have been pronounced, the case is not within the exemption of the statute, and the applicant is entitled to be discharged.

Upon the doctrine thus adjudicated by the Court of Appeals, *Judge Fancher's decision discharging Shanks was right; and the decision of the General Term of the Supreme Court reversing that decision was clearly wrong and in defiance of the well-settled principles of law.*

Judge Westbrook, in his opinion, says:

"That portion of our Revised Statutes which is entitled, 'Of proceedings, as for contempts, to enforce civil remedies and to protect the rights of parties in civil actions' (second volume, Edmonds edition, page 552; 3 R. S., fifth edition, page 849), gives to every Court of record 'power to punish by fine and imprisonment' for various causes, and, among others, 'All persons summoned as witnesses for refusing or neglecting to obey such summons or to attend or be sworn or answer as such witness.' The mode of procedure is also pointed out, and then it is enacted (second volume, Edmonds edition, page 557, section 23; third volume, fifth edition, page 853, section 22): 'When the misconduct complained of consists in the omission to perform some act or duty which it is yet in the power of the defendant to perform, he shall be imprisoned only until he shall have performed such act or duty and paid such fine as shall be imposed, and the costs and expenses of the proceedings.' If this provision does not reach the case before us, then, it seems to us, language fails to express thought. The Court of Appeals (24 N. Y. Rep., 74) have held, in conformity with the plain words of the statute, that the provisions of our Re-

vised Statutes entitled 'Of proceedings, as for contempts, to enforce civil remedies, and to protect the rights of parties in civil actions,' are applicable to the case of a witness who refuses to answer proper questions to a Grand Jury. These portions of the Revised Statutes give to every Court of record the power to punish by fine and imprisonment, or either, 'all persons summoned as witnesses for refusing or neglecting to obey such summons, or to attend, or be sworn, or answer, as such witness.' And they further provide that: 'When the misconduct complained of consists in the omission to perform some act or duty *which it is yet in the power of the defendant to perform*, he shall be imprisoned only *until he shall have performed such act or duty*, and paid such fine as shall be imposed, and the costs and expenses of the proceedings.' The language is plain and imperative. It was evidently the 'duty' of Mr. Shanks to answer the question asked; 'the misconduct complained of' clearly consisted 'in the omission to perform some act or duty' which it was yet in his power to perform; and, all these events occurring, the commitment was required to be 'until he shall have performed such act or duty.'

* * * * *

"In the statutes there is no limitation of thirty days upon the power of imprisonment, and there obviously ought not to be. With such a restriction a Court would be powerless to enforce its orders and insure obedience to its mandates."

The doctrine enunciated by Judge Westbrook in the above extract from his opinion is very bad law. He claims, first, that imprisonment for a criminal contempt is not limited to thirty days; secondly, that the statutory provision allowing Courts, if adjudging a party guilty of contempt, in certain cases to imprison him until he shall have performed the act or duty required of him, applied to Shanks's case. The contrary of both these propositions was demonstrated in the printed brief of Mr. Clinton submitted to the Supreme Court at Gen-

eral Term. The contention of Mr. Clinton was afterwards fully sustained by the Court of Appeals in the case of *The People ex rel. Munsell v. The Court of Oyer and Terminer of the County of New York* (101 N. Y. Rep., 245). Judge Finch, in delivering the opinion of the Court (in which all the other Judges concurred), divides contempts into two classes—namely, civil or private contempts and criminal or public contempts. In reversing the decision of Judge Fancher the Supreme Court relied upon the statutory provisions relating to private contempts. Judge Finch shows that they have and can have no relation to or bearing upon criminal or public contempts, to which the commitment in Shanks's case belongs. On that subject Judge Finch says (page 251):

“There is no difficulty about the statute (2 R. S., Edmonds edition, 759, section 14) to which the learned District Attorney refers us, as making all contempts in civil cases applicable to criminal trials. The private contempts are so applicable when they in fact occur. The statute in question accomplished nothing except to make the form and manner of proceedings adopted to punish contempts in civil cases apply to contempts on criminal trials, so far as in their nature applicable. It did not change the definition of contempts or destroy or confuse the statute classification. (*People v. Restell*, 2 Hill, 289, 295.)”

In defining what are included in criminal or public contempts, Judge Finch says (page 249):

“They are a disturbance of the Court which interferes with its performance of duty as a judicial tribunal, wilful disobedience to its lawful mandate, resistance to such mandate wilfully offered, contumacious and unlawful *refusal to be sworn as a witness or to answer a proper question*, a publication of a false and grossly inaccurate report of its proceedings.”

In speaking of criminal or public contempts Judge Finch says (page 250):

“But the situation was entirely different as to public contempts. As to these, the Court contemned was the Court which adjudged and punished, and that summarily and without the intervention of a jury. Here precise limitations were needed, and any shred or remnant of undefined common-law power was deemed dangerous. And so the Legislature decreed that ‘every Court of record shall have power to punish as for a criminal contempt persons guilty of either of the following acts, *and no others.*’ Observe the difference in the two acts founded upon the inherent difference between the two classes. The private or civil contempt might go beyond the statutory enumeration, and include also what was usual or permissible at common law. But the public or criminal contempt was precisely defined and barred in by the statute enumeration. The phrase ‘and no others’ implies that there were or might be other and non-enumerated offences answering the description or characteristics of public contempts, which, but for the statute, might be so deemed and punished; and all these it was affirmatively intended to shut out, at least until subsequent legislation should let them in. So that for the criminal contempt we may look only to the statute, while for the private or civil contempt we may resort, if need be, to the common law.”

The statute in relation to criminal contempts expressly limits the punishment, if it be a fine, to two hundred and fifty dollars, or, if it be imprisonment, to thirty days.

The Court of Appeals held “that an act which is not a private contempt, and is not enumerated among criminal contempts, is not a contempt at all, although it may be, and often is, punishable as a misdemeanor.” It appeared that during the progress of a trial of an indictment for an assault with intent to kill, one of the jurors went to the scene of the affray for the purpose of ac-

quainting himself with the locality. For this act he was adjudged by the Court guilty of contempt, and was committed therefor. This was held to be error.

Mr. Clinton would have immediately appealed from the decision of the General Term of the Supreme Court reversing the decision of Judge Fancher which discharged Shanks on the *habeas corpus* but for the fact that the further prosecution of him for contempt of court in refusing to answer the question put to him by the Grand Jury was abandoned. The object of the *habeas corpus* proceedings before Judge Fancher had been accomplished in the liberation of Shanks from imprisonment. The decision of Judge Fancher answered as good a purpose as if the General Term had affirmed it. Shanks was never again arrested, nor put to any inconvenience by reason of the commitment of the Kings County Oyer and Terminer.

CHARGES AGAINST DISTRICT ATTORNEY BRITTON OF VIOLATIONS OF OFFICIAL DUTY

During the autumn of 1873 serious charges of omissions to perform official duties, and of violations of duties imposed upon him by virtue of his office, were made against Mr. Britton as District Attorney of Kings County, and the Governor was asked to remove him. Among other things he was charged with having annexed to the Sheriff's return in the *habeas corpus* case, unbeknown to the Sheriff, commitment B, limiting the imprisonment of Shanks to thirty days, in place of commitment A, which consigned him to indefinite and perpetual imprisonment. A large amount of testimony having been taken on the part of the petitioners and on behalf of Mr. Britton, a hearing was had before the Governor in the latter part of December. The following is an extract from the New York *Tribune* of January 1, 1874:

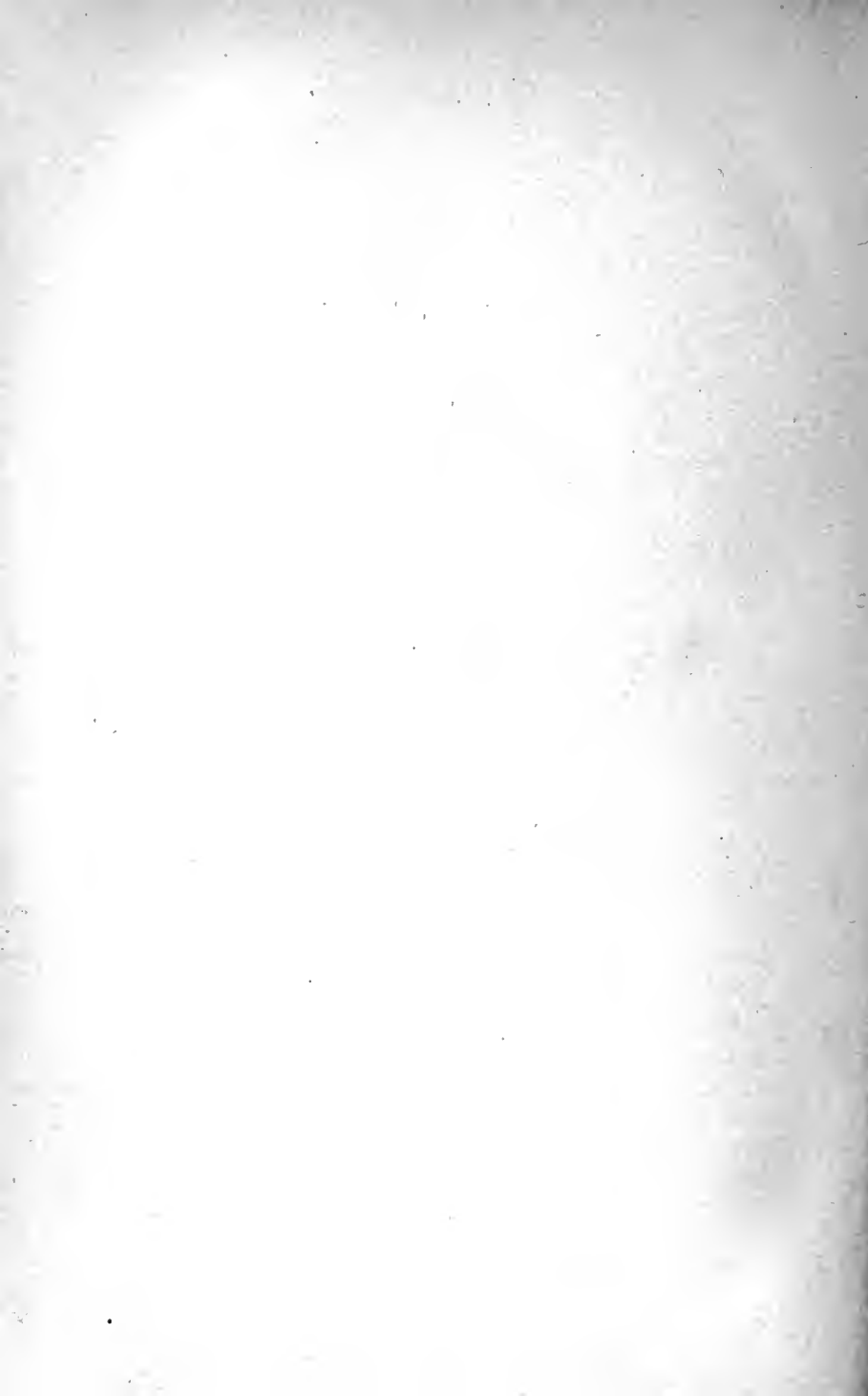
“ THE BRITTON INVESTIGATION

“Argument before the Governor Yesterday.—A Plain Recital by the Prosecuting Counsel of the Facts as Shown by the Evidence.—Long and Discursive Defence by Mr. Tracy.”

“The hearing of the arguments in the long-pending case of Winchester Britton, District Attorney of Kings County, before Governor Dix was concluded yesterday at Albany. Only about a dozen gentlemen assembled in the Executive Chamber to hear the arguments. Mr. E. T. Backhouse and Mr. William A. Coit appeared as a committee to represent the Committee of Fifty, and Colonel Julian Allen, President of the People's Reform Association, represented that organization. Henry L. Clinton and C. A. Runkle appeared to represent the *Tribune*; S. D. Morris and Colonel A. C. Davis spoke for the Committee of Fifty; and Attorney-General Barlow represented the State. Mr. Britton was not present, but was represented by Benjamin F. Tracy and Edgar M. Cullen.

“The proceedings were informal. It was arranged that Mr. Clinton and the Counsel for the Committee of Fifty should be first heard, the defence closing. Subsequently the prosecution Counsel were briefly heard in reply.”

After hearing the arguments of Mr. Clinton, Mr. Davis, and Mr. Morris in support of the charges, and of Mr. Tracy in defence of Mr. Britton, the Governor reserved his decision. After due deliberation he decided to remove Mr. Britton from office. He gave an elaborate opinion, stating the charges he sustained and those which he thought were not proven.



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THE END

EXTRAORDINARY CASES

By HENRY LAUREN CLINTON. With Photogravure Portrait. pp. x., 403. Crown 8vo, Cloth, Uncut Edges and Gilt Top, \$2 50.

PRESS NOTICES

A very interesting book. . . . During his many years' practice, the author has been associated with some of the most eminent legal lights of the day, and the charm and interest of his book lie in the fact that it contains vivid pen pictures and many characteristic anecdotes of these great lawyers. Indeed, Mr. Clinton could hardly have chosen a more fascinating subject. At all times and in all countries the great lawyers have been among the most interesting characters of the day. Who does not recall the giants of the English, Scotch, and Irish bar and their forensic triumphs in the great days of Daniel O'Connell and his colleagues? How many books have been written about them and their tournaments! No less distinguished in their own sphere were the lawyers of whom Mr. Clinton treats in this book. . . . There is no fiction, but real life, in this book, and such pictures of real life as are not seen at the present time. The legal, like every other learned profession, is not the same now as it was a quarter or half a century ago. There are, doubtless, at the New York Bar to-day men of quite as sterling abilities as any of those mentioned in this book. Very likely; and perhaps half a century hence a book may be written about them and their brilliant legal tournaments. If so, we have no doubt that our grandchildren will find it quite as interesting, though possibly *not quite so redolent of wit and humor, as we have found this book.*—*New York Herald.*

Mr. H. L. Clinton has given us an exceedingly interesting record of his experiences. . . . The book is not a mere dry report of trials, such as would appeal to the trained legal mind alone, but a lively description of the salient points in many remarkable and stirring scenes. Mr. Clinton, without deviating from truth, has managed to invest his narrative with the charm of romance, and, indeed, *romance could hardly suggest anything stranger.* All men of long standing in the profession have necessarily had their experiences, but it is not given to many lawyers to hold briefs in such a variety of prominent causes, ranging from those where life and liberty were at stake to litigations involving amounts of many millions. — *Philadelphia Press.*

This is a handsomely printed volume, reciting the interesting features of law cases. . . . They cover almost every form of litigation in both civil and criminal practice. *To the young lawyer they will be found abundantly suggestive and instructive.* Many of the sketches are full of interest to the general reader. Some of these cases were among the *causes célèbres* of their time, and are particularly interesting on account of the historic battles of the eminent lawyers engaged. —*Chicago Inter-Ocean.*

In his practice Mr. Clinton met as associates and adversaries the best lawyers in the country—Daniel Webster, Charles O'Connor, James T. Brady, John Van Buren, David Graham, Ogden Hoffman, and so on. He has in his retirement written an account of the "Extraordinary Cases" which came under his notice. This book will be found interesting, not only to lawyers and "old timers," but also to the general reader, for *it contains many graphic descriptions of life, and suggests pictures illustrative of the legal manners and customs of a past generation.*—*New York Journal.*

Mr. H. L. Clinton has brought out a most interesting work, in which he gives an account of some of the most famous cases of the time, interesting in themselves, and also because of the eminent lawyers engaged in them. In many of these cases he was himself counsel, and so writes from intimate personal knowledge. . . . *Mr. Clinton's volume, in short, is not only intensely interesting from a legal point of view, but it is filled with anecdotes relating to judges, lawyers, and newspaper-men, making it one of the popular books of the day.*—*Boston Advertiser.*

A very interesting volume of professional reminiscences. The title is "Extraordinary Cases," and they are all of that type, involving not only life and liberty, but noted litigation in which millions are concerned. Mr. Clinton was admitted to the bar in 1846, and devotes a chapter to legal practice and judicial proceedings at that time, which is very interesting. In many of the cases recounted Mr. Clinton acted as counsel, and as a whole they rank among the *causes célèbres* of their time. . . . All through the book are anecdotes of judges, lawyers, journalists, politicians, and well-known men. . . . The book is one of the most interesting of the kind that has been produced in this country, and to the legal fraternity will be *as rich in interest as a romance.*—*Pittsburgh Post.*

A distinguished New York lawyer sketches here a number of extraordinary legal cases, which have attracted the attention of the public during the last forty years. In many of these Mr. Clinton was professionally engaged, and the famous members of the Bench and

Bar brought up in them lend great weight to the book, in addition to that derived from the cases themselves. Few books give in *condensed yet dramatic form and force* such cases as the Forrest divorce case, the Lemmon fugitive slave case, or that of Madame Jumel, as here presented. More than a score of cases are related, and so related as to be of use or interest to the general reader as well as the professional man. *The book is a distinguished success.*—*Pittsburgh Chronicle-Telegraph.*

Anything which reveals human nature is of unfailing interest. This fact explains in part the public's fondness for reading a history of the causes leading up to a comedy or a tragedy. Unusual lawsuits or prosecutions have the same power to fascinate, and those which really occur exert this power to a greater degree than those which one finds in novels. On the other hand, the excitement attending a trial partakes, in some measure, of that which attends an athletic contest, while the battle between wits compels the attention of people whom a physical struggle would not move. Mr. H. L. Clinton has selected for this volume a few cases in which he has taken a part during his practice in New York. . . . The case of Henri Carnal, who was tried for murder in 1851, made a stir at the time. The record serves to show the strenuous efforts, aside from the presentation of cases in court, that a lawyer may be called upon to make in order to save a client's life. The case of Otto Grunzig is similar. The anecdotes are not without humor, *and as legal battles all the cases have the merit of being far out of the ordinary run.*—*Boston Herald.*

The author of "Extraordinary Cases" was engaged for a period of more than forty years in active practice at the New York Bar, and knew intimately all the leading professional men and politicians of the time. His book is, therefore, replete with interesting reminiscences of such men as Charles O'Connor, James W. Gerard, John Van Buren, Francis B. Cutting, Washington Hunt, A. Oakey Hall, and James T. Brady. Mr. Clinton more particularly aims at the relation of certain cases that by reason of their remarkable features are considered interesting, not only to members of the profession, but to the general reader as well. . . . In the case of Henri Carnal, who was tried for murder, Mr. Clinton was appointed counsel on the call of the case, and was forced to take up the defence without a minute's preparation. The story of his unceasing and tireless efforts on behalf of his client during a litigation that lasted several years is both *exciting and dramatic.* . . . Mr. Clinton notes many changes in the practice of law as he found it and as it is to-day. Perhaps the most striking change was the abolishment of the fee system under the Constitution of 1848. Until then it was customary, when handing up an order for a Judge's signature, to accompany it with a dollar, the Judge's fee, and the

order was universally granted, as otherwise the money could not be retained. The Judges of the Court of Common Pleas and the Superior Court were said to have received from \$12,000 to \$15,000 per annum from fees in addition to their salaries.—*New York Times*.

Tells of many famous suits in which he has been engaged in past years. They are interesting and sometimes dramatic. . . . In several cases the author's address to the jury is given, and he is seen to be a shrewd and witty pleader.—*Hartford Courant*.

Mr. Clinton having been engaged in many celebrated cases in which life and liberty were at stake, and in almost every variety of noted litigation, involving amounts ranging, as he says in his preface, from \$100 to \$100,000,000, it occurred to him that the sketches of a few of these cases, with (in some instances) his arguments in them, might be of sufficient interest to the profession and the general public to be worthy of publication. This is decidedly a readable book, and *any lawyer, old or young, who takes it up and once becomes interested in it will have a desire to read it through*.—*Chicago Legal News*.

A clear account of notable cases which attracted general attention at the time when they were tried. . . . The orderly arrangement, *lucid and graphic* style of Mr. Clinton put the reader in full possession of the facts and their comparative value.—*Christian Intelligencer*, N. Y.

A most instructive and (even to a laymen) most interesting book. Gives the outlines of unusual and generally celebrated law cases, with numberless anecdotes of the prominent men who figured in them. . . . Perhaps the best of the book is the store of story, anecdote, and repartee with which the pages are enlivened. Mr. Clinton has long been associated with the best of his profession, and *no abler writer of such a book as "Extraordinary Cases" could have been selected*.—*Portland Transcript*.

Mr. Clinton has a lawyer's fondness for legal detail ; but he is a good story-teller, and *his book, which records the forensic combats of all the great leaders of the New York Bar, will be found of great interest and of permanent value*.—*San Francisco Chronicle*.

Mr. Clinton begins his book with an account of his examination by Charles O'Connor for his admission to the Bar of New York, in 1846, and goes on to tell of many important and interesting cases which came within his knowledge during many years of active practice. He gives many anecdotes of distinguished counsel of a past generation, and tells how they prepared and argued their cases in

those days when the leading members of the Bar gave their best energies to jury trials and to criminal cases. Many of the trials of which he tells are famous ones, and interesting in themselves, and all through the book there are anecdotes of well-known lawyers and public men. Mr. Clinton tells the stories of the cases, and shows how the lawyers of those days carried on their contests. His own part in the cases is not omitted, and his stories are told with the assurance that all the details will be interesting, and it is perhaps this which gives them much of their interest. The enthusiasm of the writer is contagious, and one wishes there were cases nowadays which he would himself be able to make interesting to the lawyers of forty years hence.—*New Jersey Law Journal*.

Comprises sketches of certain historic *causes célèbres*, in many of which the author, a distinguished member of the New York Bar, was engaged as counsel. The cases of Polly Bodine, Henri Carnal, Otto Grunzig, Mortimer Shay, Moses Lowenberg, the Forrest divorce case, the Lemmon slave case, the Jumel case, and the case of Millspaugh v. Adams are among the novel ones cited. . . . Mr. Clinton's book presents many interesting points of practice and examples of skill in legal fence, and should be greatly relished by members of the profession.—*Dial*, Chicago.

Is made up of summaries of exceptional legal incidents, in many of which the author acted as counsel. Many of the cases are of a criminal nature, and the efforts that have been made by counsel to save a client's life are as exciting as the days when the foam-flecked horse galloped to the foot of the scaffold whereon the axe and block were waiting, the rider waving above his head the king's pardon. . . .—*Syracuse Post*.

It is a long time since we have seen any book whatever of the kind, and we do not remember ever to have seen a better. What "yarns" are from a sailor, these "cases" are from Mr. Clinton, and he renders them with a circumstantial memory, a vivid portraiture of personality, and a gift for relating anecdotes which imparts to the volume an unusually interesting quality.—*Literary World*, Boston.

Henry L. Clinton, who has been connected with many celebrated cases in which life and liberty were at stake, and in every variety of litigation involving amounts ranging from \$100 up to \$100,000,000, has prepared a number of sketches of some of the most notable and legally interesting of these cases, which he has thought of sufficient interest to the legal fraternity and to the general public to warrant publication. In addition to his review of the cases, the arguments which Mr. Clinton made before the jury are given in several instances.

The author has gleaned from his wide experiences these extraordinary cases which have challenged public attention at the time, and incorporated in their history the curious, peculiar, and interesting incidents brought out by or developed in the trials. In connection with the case of Frederick A. Talmadge against Horace Greeley, which dates back to 1855, many anecdotes relating to the eccentricities and characteristics of the latter are given, several of which will be fresh to the average reader. In short, Mr. Clinton's book abounds with amusing, interesting, and valuable reminiscences of great men and events which should make it appreciated by members of the profession. *It is written in a genial, off-hand, easy style which enhances its interest.*—*Detroit Free Press.*


Henry Lauren Clinton has just published his legal recollections, and from it the *Green Bag* has collated some of the anecdotes, feeling sure that a taste of Mr. Clinton's reminiscences will inspire its readers with a desire for the book itself. The book is very readable, and is in good taste and admirable reserve. . . . Mr. Clinton's account of the legal phases of the important cases in which he has been counsel is interesting, and frequently very suggestive and useful. His reminiscences and sketches of the great men of the early New York Bar are extremely entertaining, and much of this is quite fresh. Mr. Clinton's power of description and his sense of humor are marked. He conveys a good deal that is new, curious, and amusing about Brady, Clark, Cutting, Gerard, Graham, Edmunds, Jones, Oakley, Ogden Hoffman, O'Connor, Ogden, Jordan, John Van Buren, Blunt, Ira Harris, Henry E. Davies, Horace Greeley, Daniel Webster, and others.—*Green Bag*, Boston.

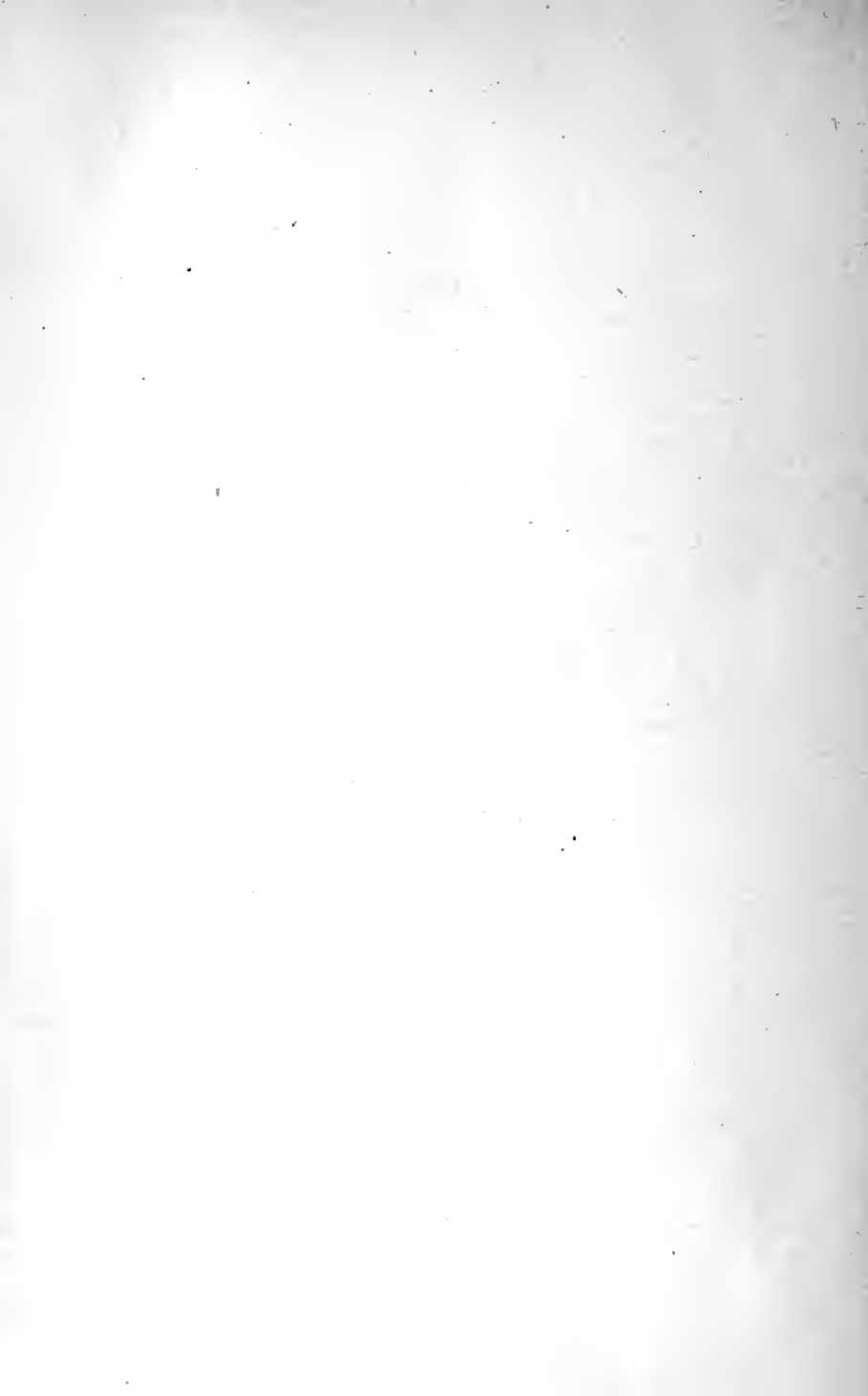
His (Mr. Clinton's) distinguished career at the Bar is well known. . . . He has been engaged in a large part of the most celebrated cases ever tried in this country. For example, the Cunningham-Burdell murder case, tried in New York in 1857. Although when he was retained in the case the chances against Mrs. Cunningham in favor of her conviction were fifty to one, yet Mr. Clinton secured her triumphant acquittal. This was the most celebrated murder case tried in this country for the last one hundred years. Another very noted case, in which Mr. Clinton was concerned, was the Taylor will case, involving about \$3,000,000. The Surrogate admitted the will to probate, but Mr. Clinton obtained the unanimous decision of the Court of Appeals, reversing the Surrogate's decision. Mr. Clinton was counsel in the celebrated A. T. Stewart will case. The estate in that case was supposed to amount to \$40,000,000 or \$50,000,000. Mr. Clinton was principal counsel on behalf of William H. Vanderbilt and his co-executors in the Vanderbilt will case, which, directly and

indirectly, involved about \$100,000,000. . . . During the last twenty or twenty-five years he was in practice he took an active part in political affairs. He was one of the leaders in the onslaught upon the Tweed Ring, and did as much as any person in the city of New York to overthrow that cabal. He acted as one of the counsel for the prosecution on the trial of Tweed, and on the first trial of A. Oakey Hall (then Mayor of New York City). He acted as counsel for John Kelly (the great leader of Tammany Hall) in his suit against Mayor Havemeyer and Nelson J. Waterbury for libel. Mayor Havemeyer died while the case was on argument. Mr. Clinton was the leading counsel for the defence on the trial of Richard Croker for murder. During his entire forty years' experience at the Bar, Mr. Clinton figured conspicuously in the newspapers in regard to legal and political affairs. . . . *The most extraordinary of all the cases appearing in Mr. Clinton's book is the case of Henri Carnal. Probably no case ever tried in the City of New York was attended with more thrilling and startling incidents.—Brooklyn Standard-Union.*

From experiences of forty years in active practice of the law in New York City, Henry Lauren Clinton has derived the details of incidents in litigation and criminal procedure which he has set forth in a most attractive way for popular reading. Some of these cases have become famous on account of the points at issue and the eminence of the counsel concerned in them; others are noteworthy for the ingenuity displayed in prosecution or defence; still others depend for their chief interest upon the dramatic episodes with which they were attended. Mr. Clinton has the art of concise narration; he studiously avoids technicalities; his descriptions of court-room scenes, many of which seem to have been drawn from personal observation, are intensely vivid; and he enlivens his pages with an abundance of anecdotes about judges, lawyers, journalists, and public men. The romantic, tragic, and humorous pictures of legal practice have always had a charm for the general reader, and this volume, of which the title is not at all far-fetched, has the fascination of a collection of well-written detective stories, with the added attractiveness of being unquestionably based upon fact. The legal fraternity will of course accept Mr. Clinton's book as a welcome alleviation to the monotony of professional routine; but it addresses itself more especially to the great public, and from them is likely to receive its heartiest appreciation. —*Boston Beacon.*

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